THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MAY 7, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

THE ATTORNEY-GENERALSHIP. — The President has accepted the resignation of Mr. Attorney-General Williams, and appointed Hon. Edwards Pierrepont, of New York, a sound and able lawyer, in his stead. The change is a welcome one; for whatever may have been the merits or demerits of Judge William's administration, it has long been clear that his abilities were inadequate to the discharge of the duties of the office.

STATUTE OF FRAUDS—SURETYSHIP.—In the case of Bessig v. Britton, we this week present to our readers a very interesting exposition of that branch of the statute of frauds which prohibits actions on parol promises to answer for the debt, default or miscarriage of another. The court hold that a verbal promise to hold a person harmless in case he will become surety on a replevin bond for a third person, is within the statute. The useful note appended to the case is by Simon Obermeyer, Esq., of the Saint Louis bar, from whom we hope to have further assistance in the same department of labor.

ERRATA.—By a failure to correct the proof of page 281 of our last number, several errors occurred in Judge Bliss' article, upon "Relief in Equitable Causes," which obscure the sense. In left column, second paragraph, seventh line, for "This principle should not," read, "This, upon principle, should not." Last line, same column, for "the time will," etc., read, "the term will, etc." On second line, right column, for "by writing in the same petition different," etc., read, "by uniting in the same petition, by different," etc. In second paragraph, second line, after "trial" insert "by jury," and in fourth and fifth lines, the word "restrain" should be "sustain." There are besides several typographical errors which will not mislead.

THE SAINT LOUIS BAR ASSOCIATION.—This association held its regular meeting on Monday night, and notwithstanding the storm, there was a good attendance. There was an interesting discussion on the question of abolition of jury trials in certain cases, a recommendation having been made by the judiciary committee that the association present for adoption to the constitutional convention such a measure. While it was acknowledged that there were many evils inseperably connected with the present jury system, yet the prevailing opinion was that it would be unwise at present to attempt any sweeping reform. The recommendation was voted down.

Albert Todd, Esq., then presented for consideration certain modifications of the jury system—one especially providing that jurors must be able to read and write the English language, and another providing that the fact that a jury has read in the papers an account of the subject-matter to be tried, and formed an opinion thereon, should not operate as a disqualification. These proposed amendments were laid over for discussion at the adjourned meeting.

The committee on grievances was instructed to ascertain, if possible, the names of the parties advertising to obtain divorces with secrecy and dispatch, and if they are found to be members of the bar, to take such action in the matter as they shall deem expedient.

The association adjourned to meet Saturday, May 8th, at 3 o'clock, at which time the question of the present judicial system of St. Louis county, especially as regards the general term, will come up for discussion.

The Brigham Young Divorce Decision.

The Salt Lake Tribune recently referred to the decision of Judge McKean, in awarding *ad interim* alimony to Ann Eliza Young, nineteenth "wife" of the Mormon prophet, Brigham Young, in the following language:

> The decision in the Ann Eliza case has also been represented to the President as extra-judicial and fanatical, when the truth is that the soundness of the decree is affirmed by every unprejudiced member of the Salt Lake bar, and was also approved at a meeting of the Bar Association in San Francisco. And any other lawyer or intelligent man who reads the decision will declare that as the case was presented to the court, his honor *could not have decided otherwise.*

1. In the evident rancor which exists between Saints and Gentiles in Salt Lake, we doubt whether there are any members of the bar of that city unprejudiced on this question. 2. It is very problematical what sort of lawyers a bitter partizan journal, like the Salt Lake Tribune, would consider unprejudiced. 3. We do not believe, and shall not believe, until we have better evidence for it than the editorial columns of the Salt Lake Tribune, that the San Francisco bar association has approved this decree. Bar associations are not, so far as we are acquainted with them, in the habit of approving or disapproving judgments of the courts, particularly those of other states or territories than their own, and which relate to local questions. 4. We know a number of intelligent lawyers who believe that Judge McKean could and should have decided otherwise. Judge McKean knew, *as a judge*, that if Ann Eliza Young, was not the wife of Brigham Young, she was not entitled to alimony. He knew, *as a man*, that she was not the wife of Brigham Young. It was therefore his duty to inform himself of this fact, *as a judge*, before granting such an allowance; and this he could no doubt have quickly done by opening his ears to evidence. The point we insist upon is that a judge has no right to stop his ears against evidence, and planting himself on a technicality, to decide a question on an *assumed* state of facts which he knows to be false. Our reasons for assuming that Judge McKean knew, as a man, that the plaintiff was not the wife of Brigham Young, are that every intelligent person knew it. For the last year she has straddled around the country, and published the fact herself in public lectures, which she has delivered not only in the principal cities of the states, but also in Salt Lake City. Indeed her avowed status as the nineteenth "wife" of the "prophet," is a matter of such historical notoriety, that no intelligent person could plead ignorance of it.

The English Contempt Case.

England, as well as Chicago, has a contempt case, and the judge whom the newspapers across the water have been attacking is Mr. Justice Denman, of the court of common pleas, son of the great Lord Denman. He recently committed a man for one year for threatening a witness in the presence of the jury. The facts were as follows: Two men were indicted for uttering base coin, Craddock, the elder, after two former convictions. The other man, who was much younger, pleaded "guilty," and stood aside while the jury were being sworn to try Craddock. "At that time," says the learned judge, "I observed that Craddock stepped up to the other in a hasty way and spoke to him, and that the turnkey stepped between them and drew the other man aside." Craddock was tried, and although the case was one of strong suspicion, he was acquitted. The learned judge was then informed by the turnkey, that just before the trial began, upon the other man's pleading "guilty," Craddock had gone up to the other man and threatened that he would "give it him" or "do for him" when he (Craddock) came out, for "splitting upon him." The learned judge added, "I had, and have, no doubt whatever that what he meant was to threaten the other man if he gave evidence on the trial against him. This I looked upon, and still look upon, as a very gross contempt of court, which, having occurred under the eyes of the jury and in the dock, just at the commencement of his trial, it was my duty to summarily punish if not erroneously imputed."

The home secretary, having been interrogated with reerfence to this case, in the House of Commons, gave notice that shortly after Easter, he would bring under consideration the general subject of the power vested in her majesty's judges without any appeal, without any reference to a jury, to inflict fine and imprisonment for so-called contempt of court.

The leading English journals discussed the matter as follows:

The Morning Post said: "Mr. Justice Denman will have rendered an immense service to the nation, if the result of the recent committal of Craddock for contempt of court, should be that a similar act is rendered impossible for the future." The Times said: "We do not say that Mr. Justice Denman was not acting at Hertford within his powers, but we do unhesitatingly say this: 'That the case proves that such powers ought not to be vested in any judge.'" The Pall Mall Gazette said: "We trust that the discussion in Parliament will induce the judges to set bounds for themselves to the authority which they at present exercise with respect to contempt of court. Arbitrary authority of any kind is a dangerous possession, and is apt to grow by invisible accretions in the hands of its possessors; it is only by the jealous supervision of those for whose ultimate benefit it is conferred, and by the wise self-restraint of those who wield it, that it can be prevented from degenerating into a scandal, if not into an absolute instrument of oppression." The Morning Advertiser, commenting on the same case, remarked "that it hoped to see it made the pivot of re-action, and Sir Alexander Cockburn's pleasant theory and practice of contempt, stamped with all the reprobation it merits at the hands of a free people."

—A KANSAS correspondent writes: "Dear Sir, I took your Journal last year; can't take it this year. Cause—G. hoppers." This must be from the county in which the G. hoppers ate up two Methodist churches.

The Removal of Chief Justice McKean.

We have received from an unknown source a printed sheet containing copies of several articles lately published in the Salt Lake Daily Tribune, commenting severely upon the conduct of the President in removing Hon. James B. McKean from the office of chief justice of Utah territory. We have hitherto refrained from commenting upon this matter, because our information has not been sufficient to enable us to do so with propriety. The strength of our impressions has been, however, notwithstanding Judge McKean's order awarding *ad interim* alimony in the Ann Eliza Young divorce suit, which we can not justify on any principles of jurisprudence with which we are familiar, that he ought not to have been removed. And this impression had its foundation in the view that the tenure of judicial officers should not depend upon the pleasure of the appointing power; and that when it does so depend, the power of removal should never be exercised, except upon a hearing and a clear conviction of gross incompetency, or of crimes or misdemeanors which would warrant an impeachment.

But we confess that these impressions have been somewhat shaken by the perusal of the paper before us. It is quite apparent to us, that when a community in which a judge has jurisdiction to try crimes, is divided into two classes, one of which persists in breaking and defying the law in some essential particular, while the other class insists that the law shall in that particular be strenuously enforced, he must, if he enforces the law, secure to some extent the hatred of the one class, and the applause of the other. This might be supposed to be the case where a strong temperance law is in force, one class of the community refusing to yield obedience to it, and the other class being in favor of its rigid enforcement. But even here it is quite possible for a judge so to demean himself as to secure the approbation of all intelligent people, no matter what their views may be as to the policy of the law. Indeed, although the courts of Maine, Massachusetts, and perhaps of some other states, are called upon to enforce stringent temperance laws, yet we have never heard complaints of the partiality of judges who do their duty in this particular. All intelligent people understand that a judge is not a legislator, and has nothing to do with the policy of the laws which he is called upon to enforce, and that when he administers those laws so as to secure, as far as the imperfections of judicial procedure and of human nature will admit, fair and impartial trials, he is not responsible for the results.

Strong as is the rancor (always the case where religious opinions enter into the controversy), between the "Gentiles" and "Saints" in Utah, we can not but believe that a judge possessing adequate learning and a proper judicial temperament, might discharge his whole duty in that territory without being looked upon as a *leader* by one party, and villified as a persecutor by the other. In this situation Judge McKean found himself before his removal; and the paper before us, which represents his side of the question alone, tends to convince us that the Gentiles regarded him as their leader in the onslaught they were making on the Mormon church, and that to be so regarded was not ungrateful to him.

We are told in the beginning that Judge McKean was a personal friend of President Grant, who appointed him chief justice of Utah, "without solicitation, but solely on account

of his eminent fitness for the responsible and very difficult position he selected this sound lawyer to fill." We knew that the President had a predilection for the appointing of his "personal friends," and even of his relatives to office, without much regard for their fitness, but we do not choose to draw any conclusions from that fact in this instance. We are further told that when Chief Justice McKean entered upon the disapproval of the duties of his office, "unconstitutional and oppressive and absurd acts of the legislature (not being brought before Congress for disapproval, were thus tacitly accepted by that supreme legislative body), effectually barred the execution of the laws, *and this placed our unflinching champion of popular rights in the position of a military commander on a field of battle, stormed at with shot and shell, and yet without ordnance or small arms to keep his assailants in check.*" We are afraid that the sentence which we have italicised furnishes the key to the whole story. We are afraid that the new appointee, finding himself between two fiercely contending factions, one of which had nullified the laws of Congress by local legislation, insensibly took sides with one faction and soon came to regard himself as a general of cavalry, leading the forces of law and order against their enemies. Not only did he apparently so regard himself, but he found the operations of the campaign hampered and delayed by untoward circumstances, such as have perplexed many another commander. And while meditating the design of breaking up camp and advancing as soon as the roads should get dry, he felt called upon to apologize to the public for his seemingly inexplicable delays, which he thus did, in suitable military language, in a letter to the editors of the Salt Lake Tribune, dated April 10, 1874. The italics are ours:

> Ah me! what a thankless duty it is to stand and hold the *key to an important position*, without the power to *advance*, to make a *sortie* or even to *strike one blow!* How such a *forlorn hope* is misunderstood, and even censured by the superficial observer and thinker! But when that *forlorn hope* is finally *armed* with *overpowering artillery*, and then takes a *match* and *blows the enemy into the air*, why then the heedless world thinks that is true glory, and throws its hat into the air also at the success achieved.

He then condescends to talk less like a general, but not more like a judge, in the following language:

> It has sometimes required more philosophy than I am master of, to wait patiently and silently under the injustice which I have suffered from even the republican press of the country, and even every department of government at Washington, save the executive. If, however, I shall be invested with such authority as a judge has elsewhere, I know that I can wield it with such moderation, and yet with such firmness, that in a short time ninety of every one hundred Mormons will see and admit that they have never had a better friend than I; and the public elsewhere will see that a tract of country, equal to some empires, is saved from barbarism and secured to American institutions; and then I will try not to despise those non Mormons, who oppose and embarrass me now, but will praise me then.

He concludes in a military tone, by sincerely thanking the editors of the Salt Lake Tribune for their "kind approval and *vigorous co-operation.*"

It is obvious that when a judge reaches a position where he likens himself to a military commander, and feels grateful for the "vigorous co-operation" of partizan newspapers—no matter whether he has reached that position through his own fault or the pressure of external circumstances—his usefulness is at an end. And so his "friend," the President, evidently after much reluctance, at last concluded; and thereupon, to borrow an expressive sentence from the document before us, "our friend slid out on his ear."

Court for Crown Cases Reserved.

In 1845 Lord Denman drew up and submitted to the home secretary a paper entitled "The Court of all the Judges," in which the origin, constitution and procedure of the court for the consideration of the Crown Cases Reserved is stated, "with a view to the much needed reform of that tribunal."* "This court," he writes, "is a voluntary meeting of the judges without commission or mandate, without seconds or officers. It has met and consulted from an early period of our history to determine questions of importance. Many of the cases reported by Lord Coke were finally decided there. The judgment, indeed, was pronounced in that court to which the record belonged; but it is believed to have been always comformable to the conclusion at which the assembled judges, or the majority of them, had arrived. The meetings were held in the apartment called the Exchequer Chamber, but were never called by that name and style, which, indeed, properly belonged to other courts differently constituted. After a cause had undergone the usual discussion at the bar, the two junior judges argued the disputed point on opposite sides, then the two next, and so on, till the chief justice and sometimes the lord chancellor, took a part. This was most frequently done in civil cases. In crown cases, the more correct course was to direct a special verdict to be found at the Assizes or Old Bailey Sessions, and then remove the record into the Court of King's Bench, when judgment was given according to law. But even then, when the matter was difficult or important, the judges of that court sometimes called their brethren from the other courts into deliberation with them."

The statements of fact in the Crown Cases Reserved are always drawn up by the judges respectively before whom the questions arise; and each judgment also was understood to be settled by some one of the judges, until the practice has obtained in later years, in many cases, for each member of the court to pronounce a separate judgment.† And previous to this practice, and even now, the judges do not always "set down the reasons and causes of their judgments."‡ The doctrine that the reasons for a decision should be given, so that the grounds on which it rested being understood, the judgment

* This valuable paper is published in the "Memoir of Lord Denman," vol. ii. p. 442, Appendix VII.

† Alderson, B.—"I desire to express my entire concurrence, because I think it important that the rule should be laid down clearly and distinctly by every member of the court." Straker v. Graham, 4 M. & W. 726.

‡ 3 Rep. Pref. p. 5. Boville, C. J.—"The question is a simple one, and it is not usual in these cases to give reasons for our judgment at length." Regina v. Summers, L. R. 1 C. C. 183.

Lord Eldon observed that "it was always useful to state the reasons which influenced the mind of the judge in giving judgment. If pronounced by a judge from whose decision there lay an appeal, counsel and the advisers of parties had an opportunity of weighing well the grounds of the decision; and when the matter came to the court of last resort, where the principles were settled which must regulate the decisions of inferior tribunals, it was their duty to consider all the principles to which facts in all their varieties might afterwards be applied." Wright v. Ritchie, 2 Dow, 383. And again, the same great authority said: "Upon a subject which has been so much the topic of discussion and decision, it would be a waste of time to trace the doctrine from beginning to end through all the cases, as has been my habit; which I hope will produce at least this degree of service, that I shall leave a collection of doctrine and authority that may prove useful." Butcher v. Butcher, 1 Ves. & B. 96. "I never give a judicial opinion upon any point until I think I am master of every material argument and authority relative to it," said Lord Mansfield, in Rex v. Wilkes, 4 Burr, 2549. And it is related of Lord Wensleydale, that he considered a judgment imperfect if it did not refer to every case in the books that bore on the question.

itself may be afterwards confidently applied, was thus tersely stated by Lord Mansfield: "It is not only a justice due to the crown and the party in every criminal cause where doubts arise to weigh well the grounds and reasons of the judgment, but it is of great consequence to explain them with accuracy and precision in open court, especially if the questions be of a general tendency, and upon topics never before fully considered and settled —— that the criminal law of the land may be certain and known."§ The writer is of opinion that every judgment, *in banc*, worth reporting at all, should be reduced to writing, with the reasons therefor; not merely for the sake of the verification of the report, but with a view to the improvement of the judgment itself. It was remarked by Lord Brougham, that "with an enlightened bar and an intelligent people, the mere authority of the bench will cease to have any weight at all, if it be unaccompanied with argument and explanation."

In 1848 a court for the hearing of Crown Cases Reserved was created by statute 11 and 12 Vict. c. 78, consisting of all the fifteen judges, or five of them, ‖ among whom shall be the three chiefs, or one of them, for the purpose of determining "any question of law which shall have arisen at the trial;"¶ a case for that purpose being grantable at the discretion of the judge who presides on the trial, who himself thus authentically points out to the court the doubt or difficulty with which it is called upon to deal. This important tribunal is invested with the amplest powers to secure substantial justice; to hear, and finally determine, the questions submitted to them; to reverse, affirm, or amend the judgment given at the trial; to avoid such judgment, and order an entry on the record, that in the opinion of the court the prisoner ought not to have been convicted;†† to arrest the judgment, or order it to be given at some future session of oyer and terminer and goal delivery, if the delivery of such judgment has been suspended; or to make such other order as justice may require. But the act leaves the reservation of all points of law entirely in the discretion of the pre iding judge; and this detracts in no little degree from its value, and puts the judge himself in a false position. It imposes on him a most unpleasant duty,—that of determining whether his own decision should be the subject of review. This ought not to be. The right of appeal should be absolute, and should never rest in the discretion of the judge, whose judgment the appeal is sought to reverse, whether the appeal should be granted or not.‡‡

It may, perhaps, be thought that many of the English decisions, being upon statutes of local application, must possess but local value. The same remark might, however, be made of nearly all modern reports, and not less in regard to those of most of the United States than of the English reports. It will be found that with the construction of a statute the decision of a principle is often connected; and it is well known that into our American statutes relating to the criminal law we have often imported the principles, and sometimes the very language, of the legislation of England. It has been observed with great truth, that "the accident of a case may be of no value, while its principle shall be of much; and it requires an exact understanding of the case, and a view of all its scope and bearings, to say what principle may not, in some form, be contained in it, lying in latency, perhaps, but not the less existent."§§ F. F. HEARD.

Statute of Frauds — Promises to Answer for the Debt, Default or Miscarriage of Another.

ANTON BESSIG, AP., v. WILLIAM BRITTON, RES.

Supreme Court of Missouri, February Term, 1875.

Hon. DAVID WAGNER,
" W. B. NAPTON,
" H M. VORIES,
" T. A SHERWOOD,
" WARWICK HOUGH,
} Judges.

A verbal promise by one person, who has become surety in a replevin bond, to hold another person harmless in case he shall become surety in such bond, is within the 5th section of the Missouri Statute of Frauds, and no action will lie thereon.

Appeal from the Circuit Court of Buchanan County. The case is stated in the opinion.

WAGNER, J., delivered the opinion of the court.

This was an action upon a verbal promise made by the defendant, to hold the plaintiff harmless from all damages arising, by reason of plaintiff's signing as security a replevin bond for John A. Wisner and others, they being about to commence an action for the recovery of personal property, before a justice of the peace. The petition alleged that defendant had already signed the bond as security, and that in order to make it good he requested the plaintiff to sign it also, promising at the time that he would hold plaintiff harmless from all damages arising therefrom, and from all liabilities incurred on account thereof, and that if any money was ever required to be paid in consequence of the undertaking, that he would pay it himself; that plaintiff signed the bond solely upon that consideration, promise and agreement. There was then an averment that judgment was rendered against Wisner and others, and their bondsmen, and that the property replevied was not returned, and that execution was issued against them, which defendant refused and neglected to pay, and which plaintiff was

§ Rex v. Wilkes, 4 Burr, 2549.

‖ Upon a division of the court on a point of law it is usual to direct a rehearing before the fifteen judges; but where the division is on the facts, and not on the law applicable to them, judgment will be delivered according to the opinion of the majority. Regina v. Elliott, Leigh & Cave C. C. 103, 108; Regina v. Burrell, Leigh & Cave C. C. 354, 364. So also if there is a conflict of decision, the case will be reserved for a larger number of judges. Lush. J., in Regina v. Fletcher, 43 L. J. M. C. 91. But the court of the fifteen judges is a court of the same jurisdiction, not a superior one. Kelly, C. B., in Regina v. Robinson, L. R. 1 C. C. 82.

¶ See Regina v. Meller, Dearsly & Bell C. C. 468; Regina v. Clark, L. R. 1 C. C. 54.

†† The effect of quashing the conviction is the same as if the prisoner had been acquitted.

‡‡ The present Lord Chief Baron of the Exchequer, then Sir Fitzroy Kelly, in the year 1844 introduced into the House of Commons a bill to allow the right of appeal in criminal cases. His speech on introducing the bill was masterly, and the question was dealt with in a manner not to be surpassed. This speech is reported in Hansard, vol. lxxv. p. 11, 3d series.

By the Judiciary Act of 1873, § 47, the jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the statute 11 and 12 Vict. c. 78, "shall and may be exercised after the commencement of this act by the judgment of the high court of justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said high court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said high court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said act of the eleventh and twelfth years of Her Majesty's reign." The judicature act went into operation on the second day of November, 1874.

§§ The Reporters, p. 165.

compelled to satisfy in full. These averments were denied in the answer, but the only defence relied on, at the trial, was that the promise was within the statute of frauds, and, not being evidenced by any writing, was therefore void This defence was sustained by the court below, and the plaintiff appealed.

The 5th section of the act in relation to frauds and perjuries, declares, that "no action shall be brought to charge any executor or administrator, upon any special promise, to answer for any debt or damage out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, * * * unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." 1 Wagn. St. p 656. This section of our statute is mainly a transcript of the English statute of frauds and perjuries, and it is therefore important to examine the English cases and ascertain how it has been construed there in doubtful cases. There, as in this country, it was for some time involved in uncertainty, as to whether contracts or promises of indemnity as exhibited in this record, were to be regarded as coming within the provisions of the statute. But the settled rule of construction now seems to be, that the statute applies. The cases proceed upon the theory, that where there is an implied liability on the part of a third person to reimburse the plaintiff, or remunerate him for the damages or loss suffered on his, such third person's, account, the promise of the defendant, in an action upon an alleged undertaking to indemnify the plaintiff, is an undertaking collateral to the implied liability of such third person, and so falls within the statute, and must be in writing, and signed by the defendant or some one by him authorized to sign the same. The earliest case in which this question was raised, was Winckworth v. Mills (2 Esp. N. P. 483), decided at *nisi prius*. There, one Taylor made a promissory note to the defendant, who endorsed it to another, who endorsed it to the plaintiff, and he having lost the original note, applied to the maker, who made a difficulty about paying it, whereupon the defendant verbally promised to indemnify the plaintiff if he would endeavor to enforce payment from the maker. The action was in part to recover expenses incurred in such endeavor, and Lord Kenyon ruled, that, as to that part which was based on the promise to indemnify, the plaintiff could not recover, because it was a promise to answer for the debt and default of another.

In Thomas v. Cook (8 Barn. & Cress. 728), a different doctrine was announced. In that case the plaintiff, at the request of the defendant, executed a bond with him and another, to save harmless a third person from the claims upon an old firm in which he had been a partner, and the defendant verbally promised the plaintiff to save him harmless for executing the bond, and the court decided that the defendant's promise being merely to indemnify, was not within the statute. Bayley, J., saying that in his opinion a promise to indemnify did not fall within either the words or the policy of the statute of frauds; and Parke, J., said: "This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties that the plaintiff should be indemnified against the bond." But in the subsequent case of Green v. Cresswell (10 Ad. & El. 453), in the same court, Thomas v. Cook was overruled. There the declaration stated that John Reay had sued Joseph Hadley by *capias*, on which Hadley had been arrested; and in consideration that the plaintiff, at the request of the defendant, would become bail for Hadley upon the *capias*, the defendant promised to indemnify him; but Hadley did not put in special bail, whereby, etc. At the trial the plaintiff had a verdict; but as the pleadings showed that the promise was verbal, a rule *nisi* to arrest the judgment was obtained, which the court, after argument, made absolute. Lord Denman, C. J., delivering the opinion of the court, said: "The promise, in effect, is, 'if you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail-bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him.' If there had been no decision on the subject, it would appear impossible to make a reasonable doubt that this was answering for the default of another." He then referred to Thomas v. Cook, and added: "But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down, which taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but even in that shape, we can not see why it may not be in the words of the statute. Within the mischief of the statute it most cartainly falls. A distinction was hinted at, from the circumstance of Hadley's debt being due to a third person, and the default, therefore, incurred towards him, not towards the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and besides may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless by paying the debt or surrendering?" This case has ever since been considered the established law in England. In the last reported decision on the subject (Cripps v. Hartnoll, 2 Best & Smith, 697), the case showed that one Sarah Elliott, the daughter of the defendant, had been committed to plead to an indictment against her for a misdemeanor, and to be further dealt with according to law; and, being so committed, the defendant requested the plaintiff to become bail for her, and to enter into certain recognizances for her appearances: and the defendant agreed, in consideration thereof, to indemnify the plaintiff against all liability in respect thereof, and from all costs, damages and expenses in respect to the same Sarah Elliott did not appear according to the conditions of the bond, and the same became estreated; and the plaintiff was compelled to pay a certain sum in consequence thereof. On the part of the defendant, it was objected that the case was within the statute of frauds, and of this opinion was the court. Green v. Cresswell was quoted as decisive authority, and the judgment for the defendant was made absolute.

In the American states, great contrariety on this question exists. In New York and Maine, in an early day, Thomas v. Cook was followed, and it was held that where the defendant promised to hold the plaintiff harmless against the consequences of his signing, at his request, a writ for the benefit of a third person, the promise was in the nature of an original undertaking and not within the statute. Chapin v. Merrill, 4 Wend. 657; Smith v. Sayward, 5 Greenl. 504. And upon the authority of the cases just cited, the rule has been announced in Georgia and Kentucky that promises to indemnify are not within the statute of frauds. Jones v. Shorter, 1 Kelly, 294; Dunn v. West, 5 B. Monr. 382; Lucas v. Chamberlain, 8 Id. 276; Jones v. Letcher, 13 Id. 363. Such is also the law in New Hampshire. Holmes v. Knight, 10 N. H. 175.

But the courts of both North and South Carolina and Alabama repudiate the rule, and hold these verbal promises to be clearly not binding, if collateral to any implied liability on the part of a third person. Draughan v. Bunting, 9 Ired. 10; Simpson v. Nance, 1 Speers, 4; Brown v. Adams, 1 Stew. 51. Since the decision in Green v. Cresswell, the New York courts have overruled Chapin v. Merrill, and conformed their adjudications to the English rule. In the case of Kingsley v. Balcombe, 4 Barb. 131, an action was brought by the plaintiff to recover damages of the defendant, upon his undertaking or promise to save the plaintiff harmless from all damages by reason of his becoming bail for a third person, the plaintiff having in consideration of such promise, become bail and been damnified. It was held by the court that a valid contract must not only be proved to have been made, but the same must be shown to have been in writing, and signed by the defendant, or by some one by him duly authorized to sign the same. Mr

Justice Sill, in delivering the opinion of the court, refers to the contrary holding in Chapin v. Merrill, 4 Wend. 657, and says: "The court there correctly lay down the principle controlling this class of cases. When the promise is an original, absolute promise, it is not within the statute. Otherwise, if it is collateral to the promise or undertaking of another," but he denies the correct application of the principle in that case. And the court expressly declare that it is not sufficient that the promise arise out of some new and original consideration of benefit or harm moving between the newly contracting parties, but that this new, original consideration spoken of must be such as to shift the actual indebtedness to the new promiser, so that he must be bound to pay the debt as his own, the original debtor standing to him in the relation of surety. Other cases in that state are to the same effect. Farley v. Cleaveland, 4 Cow. 432; Corneile v. Crum, 5 Hill. 483; Barker v. Bucklin, 2 Denio, 45. The case of Easter v. White, 12 Ohio St. 219, was elaborately and ably considered, and is identical with the case we are now reviewing. Easter, the plaintiff, brought an action against Eliza J. White, the defendant, stating in his petition in substance, that he at the request of the defendant, and upon her promise to indemnify him against any loss in so doing, became a surety for one McDonald, on an under takingin replevin; and that in an action against him on such undertaking, he was subjected to damages which he had been compelled to pay; and that the defendant refused to fulfil her promise of indemnity. One of the defences was that the defendant made no promise, in writing, to indemnify the plaintiff for becoming surety in the undertaking in replevin. The court, after a most exhaustive discussion of the whole question, held the defence a good one, and decided that the promise was clearly within the statute of frauds, and not being in writing was not binding on the defendant. The earlier cases holding that the promise is not within the statute of frauds, are cited and condemned by Browne on Frauds, who expresses the opinion that they can not be sustained by any just interpretation of the statute. Browne on Frauds. §§ 159-60-61.

Now the question to be determined in arriving at a correct conclusion, is whether the promise amounts to an original undertaking, and is supported by a direct consideration, or whether it is collateral in its character, and depends upon some act to be omitted or performed by some third person It is true there is some plausibility in the argument, that where a request is made by one person to another to sign an instrument as surety for the benefit of a third party, and at the same time the person agrees to indemnify and save the surety harmless, and the surety becomes bound with that understanding; that it is an original promise founded upon a sufficient consideration. But the agreement of the surety is not to incur any liability for the person making the request, but to be responsible for a third party's acts, which makes it an undertaking collateral to the original promise. The case here presents a verbal promise by the defendant to indemnify the plaintiff against any loss by becoming surety for Wisner *et al.*, as principals in an undertaking by them executed in a replevin proceeding. The bond which the plaintiff was to be indemnified for going surety upon, was, under the provisions of the law, that the plaintiffs in that action, the principals, should duly prosecute the proceedings in replevin, and return the property if the same was adjudged to be returned, or to pay the damages and costs awarded. Therefore, the defendant's promise to indemnify the plaintiff against any loss in so becoming surety, would surely seem to be a promise to answer for the default of others, that is, the default of Wisner and others, the principals in the bond or undertaking. The very condition of the bond upon which plaintiff became surety, was such that the plaintiff could only became liable to pay any thing by reason of signing the same as surety, upon Wisner and others making default, in the return of the property, or in the payment of the damages and costs adjudged against them. The principal is always liable to remunerate his surety for all moneys paid in his behalf, and if the promise be regarded as one to make good by re-payment any loss incurred as surety for Wisner and others, still it would only amount to an undertaking, that if Wisner and others should be in default in remunerating the plaintiff as their surety, the defendant would, in Wisner and other's stead, answer for their default, by saving the plaintiff from such loss.

In whatever aspect the case is presented we can construe it in no other light, than that the obligation of suretyship entered into by the plaintiff was to be a responsibility for the default of other persons, to-wit, Wisner and others, and that therefore the promise of indemnity made by the defendant, was within the statute of frauds, and being verbal, must be held incapable of enforcement. This question has never before been directly presented in this court, and we are now to pass upon it for the first time. And we think that upon both authority and reason, the promise comes clearly within the provisions of the statute. With this view the judgment must be affirmed.

All the judges concurring.

NOTE.—The above decision is a very welcome one, for the reason that a very doubtful question is now settled in this state. There is, perhaps, not a more mooted point arising under the statute of frauds, than the one which has just been disposed of. It is almost needless to refer here to parallel adjudications in sister states; for the learned judge in his opinion has exhausted that branch of the subject. While some of the state courts deny the liability of the promisor upon a parol promise of indemnity, to save the promisee harmless from whatever debt or damage the latter may incur on behalf of a third person; still there are other tribunals of equal dignity which vigorously assert that such liability shall be enforced.

There is perhaps only one case in the Massachusetts Reports that directly passes upon this point, Aldrich v. Ames, 9 Gray, 76, wherein no other than the distinguished Chief Justice Shaw was of the opinion that the plaintiff might recover from the defendant upon an oral promise made by the latter, to indemnify and save the former harmless, by reason of his, the plaintiff's having become bail for a third person. After stating the facts, the court says: "The ground of defence is that this was an alleged promise of the defendant to pay the debt of another, and therefore that the action can not be maintained without an agreement in writing, because it is within the statute of frauds. The court are of opinion that this ground is wholly untenable. This is a promise by the defendant to another to pay his debt, or, in other words, to save him from the performance of an obligation, which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds." In this way the Massachusetts court ingeniously brings the adjudication of the point in question within the rule stated in Eastwood v. Kenyon (11 Ad. & El. 438), and affirms the liability of the promisor by a process of reasoning that has not been observed by the courts of other states which announce a similar conclusion.

In Holmes v. Knight (10 N. H. 175), Chief Justice Parker, a very eminent jurist, holds to the same doctrine, but upon the ground that the promise of the defendant to indemnify the plaintiff was not collateral to that of the person bailed, one Webster, because there was no request by the latter asking the plaintiff to become his surety, and that therefore the law could not raise an implied promise on Webster's part, to indemnify the plaintiff; that, although it was to be presumed that Webster assented, yet mere assent, without any request or promise, and when there was a request by a third party, and an express promise by him to indemnify, is not sufficient to raise an implied promise. The court observed, in conclusion, that if either liability was to be deemed collateral, the liability of Webster, in such case, would seem in point of fact, to be collateral to that of defendant.

Passing now to the law as it stands on the other side of the water, it is to be remarked that some of the English judges have, for some time, been casting doubts upon the case of Green v. Cresswell (10 Ad & El. 453); for in speaking of the same in Batson v. King (4 Hurl. & Nor 739), Pollock, C.B., says: "I do not think that the case itself was rightly decided." Besides, a new distinction has been pointed out in the somewhat recent case of Cripps v. Hartwell (4 B. & S. 414), decided in the Exchequer Chamber, and reversing the judgment rendered in the same case in the Queen's Bench. "But," says the same learned baron, in referring to Green v. Cresswell, "there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an in-

demnity, which it has been decided to be." * * * * * "This view of the subject creates, I think, a broad distinction between the present case and Green v. Cresswell, which we are not called upon either to overrule, or to say that we entirely support." Williams, J., in the same case begins his opinion by saying: "I ought to remark that I do not deem it at all necessary for us to say whether the case of Green v. Cresswell is good law or not, but I think here is a distinction between the recognizance of bail in a civil suit and the recognizance given for the appearance of a defendant in a criminal proceeding." The court rendered judgment for the plaintiff, holding in effect that the promise of the defendant, to indemnify the plaintiff against whatever damage the latter might incur by becoming bail for a third person, was an original undertaking and not collateral, there being no implied promise upon the part of the person bailed to indemnify his bail in a criminal proceeding.

It is somewhat remarkable that this distinction was not made in any of the American cases. In Holmes v. Knight (10 N. H. 175), before cited, the recognizance, in which the plaintiff became surety or bail for a third person at the defendant's request, was given in a criminal proceeding, and yet judgment went for the plaintiff, upon a different ground. And in Kingsley v. Balcome (4 Barb. 131), an opposite judgment was rendered under a like state of facts.

Chief Justice Parker was, indeed, in the right, when in passing upon the fourth section of the statute of frauds, in Holmes v. Knight, he said: "It may well be doubted whether that part of the statute of frauds, upon which the defence in this case is predicated, has not promoted more fraud than it has prevented. Certain it is, that it has given rise to many perplexing doubts; to much litigation, to nice distinctions, and to contradictory decisions."

S. O.

Homesteads in the Public Domain.

WM C. CLARK AND JAMES CHAMBERS, APPELLANTS, v. JAMES R. BAYLEY RESPONDENT.

Supreme Court of Oregon, December Term, 1874.

HON. B. F. BONHAM, Chief Justice.
" PAINE P. PRIM,
" JOHN BURNETT,
" ERASMUS D. SHATTUCK,
" L. L. MCARTHUR, } Justices.

1. **Homestead Under Act of Congress — Commutation by Payment of Money.**—When a party having availed himself of the benefits of the first section of the homestead act of Congress, May 20, 1862, and taken a homestead under the first and second sections of said act afterwards, before the expiration of five years' residence, commutes under the 8th section of that act, and obtains a patent by the payment of money. *Held*, that the land so acquired is a *homestead*, and exempt from liability for debts contracted prior to the issuing of a patent.

2. **Implied Trust will not Arise—When Entry of Homestead in Trust Forbidden.**—The entry of a homestead under the act of Congress of 1862, by one in trust for another, is forbidden by law, and a court of equity will not decree that such a trust can be implied.

3. **Homestead Act—Construction of.**—The court will not so construe the homestead act, as to make "the homestead of the unfortunate debtor his prison." The terms of this act of Congress are of a broad meaning, and evince a more liberal intent

4. **Estoppel.**—What facts do not constitute.

F. A. Chenoweth and *R. P. Boise*, for appellants; *R. S. Strahan*, *John Kelsay* and *W. W. Thayer*, for respondent.

SHATTUCK, J., delivered the opinion of the court.

Two questions are presented for examination and decision: 1. Did Clark and Chambers acquire any title to the premises in controversy, by virtue of the sales upon execution, and the sheriff's deeds described in the agreed statement of facts? 2. Are the appellants, Clark and Chambers, entitled, upon the admitted facts, to equitable relief?

It should be stated before considering these questions, that one of the grounds of equity set up in complaint—that is, the alleged fraud, in respondent, in taking a deed to the property in controversy, with an intent to cover it up and prevent the creditors of Simpson & Thorn from applying it in satisfaction of their debts, is virtually abandoned by the agreed statement of facts, and that branch of the case is not before us. It is also to be borne in mind that the appellants claim this property by virtue of sales upon execution as *real property*, and that no question as to whether the mill, by reason of the agreements between Simpson & Thorn, could be treated as personal property, and the possession of it as such recovered by Simpson or his vendee, is involved in this case. The appellant's claim to represent Simpson's interest only through the judgment and execution sales recited in the agreed statement.

As to the first question above stated, the validity of the judgments and the regularity of the proceedings concerning the sale upon the execution, are admitted; and if the sheriff's sales did not pass the title which Thorn had to the property, to appellants, it was because such property was not subject to such sale, and was not affected by the lien of the judgments, which respondent claims was the case. This claim of exemption is based upon the fact that the land was acquired by Thorn under the act of Congress, entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," approved May 20, 1862, and that the debts, which were the basis of the appellant's judgments, were contracted before the issue of patent.

The admitted facts show that Thorn applied for this land, and filed in the land office the requisite affidavit, according to the provisions of section 2 of the act, in January, 1872, and in December, 1872, perfected his title, and received a patent by paying the minimum price, under the provisions of section 8, of said act. The counsel for appellants contend that, by so acquiring this land (by payment of money instead of continued residence and labor for five years) Thorn became a pre-emptioner, and that his claim is to be regarded as a pre-emption and not as a homestead. Counsel for respondent, on the other hand, contend that this land is none the less a homestead because paid for with money, than it would be if the consideration had been labor and continued residence for five years, as required by the second section. No decision of any court upon this point has been cited by either side, and we are to determine the matter upon our own construction of the act, and upon such authority as the land department of the government has furnished.

Upon principle, we hold that land acquired as this should be deemed to have been acquired, under the homestead act, notwithstanding the provisions of the 8th section, and that a patent shall be issued in such case, "as in other cases provided by law, on making proof of settlement and cultivation, as provided by existing laws, granting pre-emption rights." These provisions of the 8th section simply prescribe a mode of commuting the homestead, and are appointed as a mode of administering the act in favor of those who have availed themselves of the benefit of the first section, by complying with the requirements of the 2nd section, and wish to pay money instead of time and labor for their land. The title has its inception and its consummation under and according to the provisions of the act. The mere payment of money, under the 8th section, ought not to be treated as the abandonment of the intention to make a homestead claim, unless the law expressly gives that effect to it. Counsel for appellants in support of their view of this question, cite the instructions of the commissioner of the general land office to the registers and receivers, in a circular concerning the homestead law, dated October 20, 1862, and found on page 248 of Lester's Land Laws, etc. This instruction is as follows: "In case where full payment is proposed to be made by a party, under the eighth section, he must first make proof of settlement and cultivation as required by existing pre-emption laws and instructions; whereupon you will require his homestead duplicate-receipt to be surrendered, and will admit the pre-emption as a new and original entry, and issue pre-emption certificate and receipt as in ordinary pre-emption cases." But this same instruction requires the register and receiver to make proper notes on the certificate and receipt so as to preserve in the record the evidence of the change. This instruction is claimed to have the force of a ruling and decision of the land department, and to warrant the conclusion that a title begun under the second section and consum-

mated under the 8th section, is a pre-emption and not a homestead.

Upon further examination of the decisions of the land department on the subject of homesteads, in the years 1866, 1867 and 1868, of which extracts are found on pages 266 and 267 of Lester's Land Laws, it appears that this subject has been directly brought before the department and distinctly ruled upon. In a case of an entry presented, wherein a homestead had been made and then commuted under the eighth section, and the point was submitted, whether the settler could make another entry under the homestead act (the 6th section prohibiting more than one grant to the same individual under the act), the ruling of the commissioner was that he could not, and it was expressly decided that "when a party acquires title under any of the provisions of this act, his privilege is thereby exhausted." And again, when the question was, whether a person has availed himself of the benefits of the homestead and commuted under the 8th section, could thereafter take a pre-emption (he never having had the benefit of the latter statute), it was held that the proceedings had by the claimant, under the 8th section, merely consummated his homestead right as the law allows, the payment being a legal substitution for the continuous labor which the law would otherwise exact at the hands of the settler. And on this subject the commissioner further says that "a claim of this character is not a pre-emption, but a homestead, and will be no bar to the same party acquiring a pre-emption right. We hold, then, that the land in controversy was a homestead acquired by Thorn, under the act of 1862.

It is claimed, however, by appellant's counsel, that though the land be acquired under this homestead law, yet it is not subject to the exemption from liability for debts, provided by the act, if it has been acquired under the 8th section. The position of counsel is that the exemption only prevails when the title is acquired by the continuous labor exacted by the 2nd section. The phraseology of the section, providing for the exemption, does not furnish any grounds for this construction. The 4th section declares: "That no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." If our position, that land entered under the 2nd section and commuted under the 8th section, is a homestead, and that it must be held to have been acquired under the provisions of the act in question, be a correct one, then surely the 4th section must apply to this land. For the words of the section are general: "No lands acquired under the provisions of this act," etc., and do not admit of any such exception as counsel claim. The intention of Congress to exempt such lands as the tract in controversy, we think is clear, and ought not, by any attempted construction to be defeated.

Counsel further claim that the benefits of the exemption provided by the 4th section may be waived, and must be deemed waived, whenever the homestead donee removes from the land and ceases to use it for a residence and home. This question we do not consider, for there is no evidence before us that Thorn had left this land or ceased to reside upon it as a homestead when the levy and sale under the execution were made.

It is also claimed that Thorn waived his rights as a homestead claimant, and submitted to a transfer of the title by the execution sale, because he did not forbid the sale and give notice of his claim under the act above referred to. No authority for this position is cited, except cases under statutes providing for the exemption of personal property, and cases where a debtor, after a levy on his real estate, is allowed to select and have admeasured to him a homestead of specified extent and value, which is not this case and no such ruling ought to prevail here.

It is also claimed that the sale and conveyance to Bayley was an abandonment of the exemption, and that appellant's deeds, though not effectual to convey to them an immediate right of possession at the time of their execution, became operative and took effect when Thorn attempted to sell to Bayley. This position can be sustained only on the assumption that the exemption from liability for debts operates merely to suspend the ordinary effect of a forced sale upon execution; in other words, it assumes that the lien of judgments operates on these homestead claims, notwithstanding the exemption, no less than upon other lands of the debtor, and that a sale upon execution will carry the fee to the purchaser, encumbered only by the right of the debtor to continually occupy as a homestead, and that the moment the debtor, by any means ceases to occupy as a homestead, the title and right become absolute in the execution purchaser; or in case no sale has taken place under the judgments, the lien will give a preference over a voluntary vendee of the debtor. The authorities cited by counsel in support of this view, are under statutes entirely different from this homestead act; they have arisen where statutes of exemption have been strictly construed, and the terms of exemption have been limited to "*sales* upon execution" or to "*forced sales* upon execution or final process from a court." In these cases, the ruling has been that the terms employed did not exempt the property from being bound and charged by a judgment, and from *sale* on execution only, while the exemption should continue in force; that is to say, so long as the debtor should occupy the land as a home, and, consequently, whenever he should attempt to sell to another, the judgment-creditor might seize it, in satisfaction of his debt.

This construction of the state homestead acts, logically results in making "the homestead of the unfortunate debtor his prison," and in compelling him to confine his energies to that particular locality for all his life, or forego the advantages of the statute. The terms of this act of Congress are of broader meaning, and evince a more liberal intent. "No lands acquired under the provisions of this act, shall, *in any event*, become liable to the *satisfaction of any debt*, or debts, contracted prior to the issuing of the patent therefor." These terms can not be rendered effective in their full scope and meaning, unless the homestead claimant should be deemed to hold his homestead absolutely free from all the direct and indirect consequences of his indebtedness, contracted prior to issue of patent, and consequently have a power of disposition thereof free from the charge or lien of judgments based upon such indebtedness.

Furthermore, the existence of a lien where there is no power of sale, is denied by many of the authorities cited upon the argument. Rorer on Judicial Sales, sec. 1, 109, and cases cited.

In California it has been held, under this homestead act, that a homestead claimant who, pending his proceedings in acquiring title, contracted a debt before patent issued, upon which judgment was rendered against him after patent, could sell his homestead to a third party and convey to his vendee a good title, notwithstanding the judgment. Miller v. Little, 47 Cal. 349.

Our conclusion is that the appellants did not acquire any legal title to the premises in controversy by the judgments and execution sales mentioned in the statement of facts; that Thorn could and did convey the land to Bayley by the deed of the 16th of September, 1873, free and discharged from any lien or incumbrance created by the judgments and execution sales recovered and had by appellants.

The other branch of appellants' case relates to their equitable claims. The principal facts upon which equitable relief is claimed are these: Simpson & Thorn, in 1871, formed a copartnership for the purpose of building a steam saw-mill, and manufacturing lumber for the San Francisco market, in which business Simpson's interest was to be eleven-twelfths, and Thorn's one-twelfth, the capital to be furnished in the same proportions. Under this arrangement they proceeded as partners to erect the mill on the public lands of the United States, agreeing with one another that they would regard the mill as personal property, and not as affixed to the realty. After their partnership had gone on for about a year, the mill being

in the meantime built upon land to which neither had any title, Thorn took steps to obtain the patent under the homestead act, as above recited, and did obtain it, as above stated. No other or new arrangement was made between Simpson & Thorn after patent issued, and the partnership continued till March, 1873, and no settlement of the business of the concern has been had. Thorn was notified of the execution sales, and did not forbid said sales, nor expressly claim the land as exempt. Upon these facts appellants claim that Thorn would be estopped to claim a homestead exemption in this land, and that the legal title which he acquired should be decreed to be held in trust for the benefit of Simpson or his representatives.

The counsel for the appellants, abandoning the question of actual fraud alleged in their complaint, seem to base their rights to relief against Bayley upon an assumption which is not very clear, but we consider it as we understand it. It is this: That Bayley having taken the deed of September, 1873, from Thorn, with notice, stands in Thorn's place as to the legal title, and that the appellants by their executions against Simpson and Thorn, and against Simpson alone, and the sales thereunder of the same land, have put themselves in Simpson's place, and representing his partnership interest, claim an equity against Bayley to be enforced upon this land. Now, so far as any estoppel is claimed by reason of Thorn's knowledge and evidence, we do not find anything approaching to an estoppel of any kind. The land was Thorn's homestead. The record of his title, of which the purchasers were bound to take notice, declared the fact, and Thorn was not called upon to say anything about it, and he did not say anything about it. It does not appear that the purchasers relied on anything Thorn said or did, or were misled in any respect by his speech or silence. In such case there is no estoppel.

The other aspect of this equitable claim seems to be taken from the position that Simpson & Thorn and this land are in the situation of parties dealing about property, concerning which there are no statutory provisions or public policy that limit the right of disposal and contract. The argument in this case has proceeded upon the assumption that this case is like one where A. and B., as partners, build a mill on the land of C., and A. afterwards acquires the legal title to the land in his own name from C., there being no limitation by law upon A.'s power to take in *trust* for another. In such case A. would probably be decreed in equity to have taken the legal title for the use of the partnership, whether such had been the express agreement with his co-partner or not. But in the case before us, this land was public land, and title could be obtained only from the government. According to the laws under which the government would dispose of it, the partnership of Simpson & Thorn could not take title to it, and in the capacity of partners, they were trespassers. Thorn could not take it in trust for Simpson or for the partnership, for the laws under which alone it could be disposed of, had expressly forbidden such a transaction. If Thorn had agreed with Simpson before patent issued that the homestead title should be obtained for the benefit of the copartnership, then he must have committed perjury in obtaining the title, for the 2d section of the act required him to swear that the land was taken for his own use exclusively, and not directly or indirectly for the benefit of another, and heavy fines and imprisonment are the penalty of false swearing in such a case. Contracts in violation of such provisions of law are void, and are never enforced. 5 Minn. R. 199; 19 Wallace R. 646.

If Thorn could not lawfully have made, in express terms, a contract of this kind, none will be implied, and equity will not decree any relief in such a case. Furthermore it may be said Simpson's claim against Thorn by virtue of the partnership, seems to have originated before patent for the land issued, if not before any settlement at all had been made by Thorn, and might properly be regarded in the light of a debt contracted before the issue of patent —as to which the land was exempt from liability. It follows from these views that the judgment and decree below must be

AFFIRMED.

Foreign Selections.

ABATEMENT OF PERSONAL ACTIONS.—That the rule *actio personalis moritur cum persona* does not apply to cases where the estate of a deceased person has suffered damage from the tortious breach of a contract made with the deceased in his lifetime, was laid down so long ago as 1822, by Mr. Justice Richardson, in Knights v. Quarles, 4 Moore, 532. But notwithstanding the frequency of actions against railway companies under Lord Campbell's Act (9 & 10 Vict., c. 93), it appears from the recent case (reported this week) of Bradshaw and Wife (executrix) v. Lancashire and Yorkshire Railway Company (31 L. T. Rep., N. S. 847), that no previous action had ever been brought since that act, in respect of damage to the estate of the deceased. It was contended for the defendants that the *obiter dictum* of Mr. Justice Richardson was not law, and that Lord Campbell's Act restricted plaintiff's executors to its own sole remedy in respect of the injury sustained by the near relatives of the deceased from the loss of the pecuniary advantages which they had derived from the continuance of his life. But the court of common pleas (Justices Grove and Denman) has refused, and as we think very properly, to be convinced by either of these arguments. The correctness of the *dictum*, in Knights v. Quarles (*ubi sup.*) had been confirmed by the great authorities, first of Mr. Justice Willes, in Alton v. Midland Railway Company (12 L. T. Rep., N. S. 103), and subsequently of Sir E. V. Williams in his classical treatise upon the Law of Executors (vol. 1, p. 798), where the point is put very clearly thus: "It must be observed that if the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action at common law to recover such damage, although the action is in some sort founded on a tort." The second objection is well disposed of by the remark of Mr. Justice Grove: "That there is no reason, either in law or logic, why Lord Campbell's Act should take away a right of action in one sense because it gives a right of action in another." It will be observed that the learned judge differed as to whether Potter v. Metropolitan Railway (30 L. T. Rep., N. S. 765, recently affirmed by the Exchequer Chamber), was distinguishable or not. It is well to bear in mind, therefore, that the recent decision is well supported by the earlier authorities so fully examined by Mr. Justice Denman. It was also contended for the defendants that the damage arising from depreciation of business during the lifetime of the deceased came within the well-known rule in Hadley v. Baxendale, 9 Ex, 341; 23 L. J. 182, Ex. But both the learned judges fully agreed in holding that "a railway company must be supposed to have it in their contemplation that if a passenger be injured, his business, if he have any, will necessarily suffer." On this point also we see no reason to question the correctness of the decision. It must be observed that the declaration was "carefully framed so as to make out a case in contract," but we presume that it might have been amended at the trial, if it had been framed *in tort*, as the declaration usually is in actions of this kind.—*The Law Times.*

RELATIVE IMPORTANCE OF CASE-LAW.—[*Continued from Vol. 1, C. L. J., p. 609.*]—An exception obtains with regard to the decisions of courts of co-ordinate jurisdiction, where the prior decision is made merely on a motion, so that there is no opportunity of carrying it to a higher court by way of appeal. In such a case the judges do not feel themselves bound by the decision, if they disagree with the law or the reasoning therein. Lord Campbell says, in Woodhouse v. Farebrother, 5 E. & B. 289, referring to a prior decision on an equitable plea, "as the case was decided merely on motion, without the opportunity of carrying it to a court of error, we should not consider ourselves bound by it, had we disapproved of it, but we entirely concur in the reasoning on which it is founded." See also per Hagarty, C. J. C. P., in Shier v. Shier, 22 C. P. 162.

Another exception also occurs when the superior courts are sitting in courts of appeal from courts of subordinate jurisdiction. In this instance each court is governed by prior decisions of its own, and is not in the habit of reversing these and conforming to conflicting decisions of other courts exercising the like appellate jurisdiction. In Boon v. Howard, 22 W. R. 540, Brett, J., observed: "Where the court has a final and exclusive jurisdiction and its personality must be changed, the action of the court is injured, unless all the judges determine to follow loyally, as has been said, the previous decisions of the court." A remarkable example of the point under consideration is to be found in the course of decision in this province upon the provisions of the first and fourth sections of the act respecting mortgages and sales of personal property. C. S. U. C., cap. 45. The question came up in several appeals from the county court as to the effect of non-registration within five days from the execution of the instrument. The court of common pleas uniformly held that until registry the instrument was void as against creditors, and that registration would not make it valid unless it took place within the five days. See Feehan v. Bank of Toronto, 10 C. P. 32; Shaw v. Gault, Ib. 240; Haight v. McInnes, 11 C. P. 518. On the other hand, the Court of Queen's Bench, has uniformly held that the filing related back to the execution, and if the instrument was filed within the five days, the assignee or mortgagee was entitled as against a writ against goods placed in the sheriff's hands after the execution of the instrument, but before its registration. See Feehan v. Bank of Toronto, 19 U.C.Q.B. 474; Balkwell v. Beddeme, 16 U.C.Q.B. 206. This conflict was so pronounced and irreconcileable that the legislature had at last to interfere, and then declared that the law, as expounded by the Queen's Bench, ought to prevail, by enacting in 26 Vic., c. 46, § 1, that every such instrument shall operate and take effect upon, from and after the day and time of the execution thereof.

Again: in cases where the liberty of the subject is directly involved (*e. g.*, application for *habeas corpus*), each court is accustomed, and, indeed, considers itself bound to exercise its jurisdiction according to its own view of the law. See *Re* Timson, L. R. 5 Exch. 261. This was also exemplified in one of the *causes celebres* of Canada, *Re* John Anderson, 11 C. P. 9, and 20 U.C. Q.B. 124.

An interlocutory order in a suit in equity is usually deemed of less authority than the final judgment given at the hearing of the cause. As remarked by Richards, C. B., in Drew v. Harman, 5 Price, 322, "an injunction is but an interlocutory order made for the sake of security, and very often the court ultimately decides exactly the other way." So in Ball v. Storie, 1 Sim. & Stu. 214, it was said by the court: "An interlocutory order of the Court of Chancery in Ireland can only be regarded here as an authority, and not as binding upon the court; although a final judgment of that court, in a case in which it has concurrent jurisdiction, might be entitled to different consideration." But there are motions, interlocutory in form, which in truth go to the whole merits of the case. When, for instance, on an injunction motion, the rights of the parties depend, not upon a conflict of evidence, but upon a question squarely arising upon the pleadings, as touching the construction of a document, or the like,—in these cases the decision, though interlocutory in form, is in effect of as much weight as a judgment given at the hearing. This distinction was brought out by Lord Manners, in Revell v. Henry, 2 B. & B. 286 His language is as follows: "But it has been said that this was an opinion on a motion for an injunction, and not a deliberate judgment on a hearing on pleadings and proofs. * * * Where all the facts appear upon the bill and answer, and there is nothing in dispute between the parties but the law of the court, it is very common, both in this country and in England, to decide the question upon motion. There are many instances in the reports in Lord Redesdale's time, and in the contemporary reports. It is a great saving of expense to the parties, and the judgment of the court is equally entitled to weight and authority." The present Master of the Rolls in England (Sir George Jessel) has expressed his intention of always following this practice: and so, where a question is fairly raised on demurrer, he does not hesitate to decide it, though many judges before his time were in the habit of reserving it for a hearing.

Where the question before the court is one not involving principle, but is a mere matter of practice, the courts will follow the practice as expounded in the last decision. In such cases certainty is of the greatest importance, and the court will not enquire into the foundation of the practice, or investigate the reason of its adoption. See Bancroft v. Greenwood, 1 H. & C. 778.

To conclude this part of our subject, we may advert to the decisions where the court consists of a single judge only, as in England in the bail court, and in Ontario in the practice court. As might be expected, these cases do not force the right which attaches to the adjudicating of a bench of judges. In Edwards v. Bennett, 5 Prac. R. 164, Gwynne, J., says: "The case decided by the full court appears to me to settle the point, and greater weight must be attributed to the decision being that of the full court, than to any of the cases decided by a single judge in the bail court."

INNKEEPERS' LIEN ON GOODS OF GUEST.—A question of great practical importance to innkeepers and their guests came before the Court of Error in the Exchequer Chamber on the 3d inst., in the case of Threlfall v. Borwick. The character of the question will be at once seen from a short summary of the facts. In December, 1870, a man named Butcher hired some rooms at the hotel of the defendant for himself and family at a fixed rate, and also agreed to pay a sum for his board. He brought with him a piano, which he had hired from the plaintiff. In January, 1871, he left the hotel, being indebted at that time to the landlord in the sum of £52 for board and lodging. He left the piano behind, remarking that Threlfall would send for it. The innkeeper thought the piano belonged to Butcher, and some time appears to have elapsed before he learnt that the real owner was the plaintiff. However, having discovered the whereabouts of the piano, the plaintiff demanded it, and upon his claim being resisted, brought an action for its recovery. At the trial, before Mr. Justice Lush, the point of law as to the innkeeper's right of lien was reserved, and the Court of Queen's Bench decided it in favor of the defendant. This decision has been upheld by the Court of Exchequer Chamber. "It was admitted," says Lord Coleridge, "that the innkeeper has a lien on the goods his guest brings with him, and that he has the same lien on the goods, whether they are his guest's or another's. The only question is whether he has a lien on the goods, not the less because he was not bound to receive them." But, as his lordship pointed out, this assumed that he was not bound to receive them; whereas when a person went with an instrument such as that for which the action was brought, and intended to spend some months at an hotel, the innkeeper, if he had room for it, would be bound to receive it. "The guest," his lordship continues, "might be in the habit of taking the musical instrument with him, for the purpose of reasonable recreation. But however that may be, having taken it, and having safely kept it for a certain time, it is too clear to be doubted that the innkeeper had a lien upon it, and both upon principle and authority the judgment must be affirmed." It would certainly be difficult to come to any other decision than this, upon the facts of the case; nor is it in the slightest degree inconsistent with the principles laid down in Calye's case.—[*The Law Times.*

PAROL AGREEMENTS COLLATERAL TO CONTRACTS WITHIN THE STATUTE OF FRAUDS.—In a recent number of the valuable reports published by our contemporary, the London Law Times,

a case appears which is of very considerable practical importance in illustrating the law connected with lettings of furnished houses, and which should be carefully considered both by the profession and by that large class of persons, such as auctioneers and house agents, who are constantly engaged in contracts of this nature, but who are frequently in the habit of acting without employing professional advice. The danger of adopting such a course can not be better illustrated than by the present case, where, on a letting of an exceedingly simple nature, a question arises of a character such as can not be presumed to be within the compass of the legal knowledge of any person who has not made a study of law. The result of such a practice very frequently is the expenditure of a sum of money in litigation, exceeding twenty times the amount which would have been spent in originally obtaining the advice of a professional man. The facts of the case—Angel v. Duke, 32 L. T., N. S. 25—were as follows: The action was brought by the plaintiff upon an agreement, before the making of which negotiations had been in progress between him and the defendant, for the letting by the defendant to the plaintiff of a house, with the furniture and effects therein. The plaintiff objected to becoming a tenant of the house, on the ground that the premises were in imperfect order, and not sufficiently furnished for the comfort of his family. The defendant, then, in order to induce the plaintiff not to break off the negotiations, promised verbally that if the plaintiff would enter into the premises without requiring the defendant to do any works or repairs, or send any additional furniture into the house previous to the commencement of the proposed tenancy, he would, within a reasonable time after the commencement of the tenancy, do such works and repairs, and send into the house such furniture as should be necessary for the convenient use and occupation of the house. The plaintiff acquiesced in these terms, and entered into possession of the house, without the repairs being made or any furniture sent in by the defendant, but, when the defendant was called upon to fulfil the contract as to these matters as he had stipulated to do in his verbal agreement, he altogether declined to do so. The plaintiff then brought the present action, and the defendant raised, on demurrer, the question as to whether the agreement did not fall under the 4th section of the statute of frauds, which enacts "that no action shall be brought whereby to charge any person upon any contract for sale of lands, tenements, or hereditaments, or *any interest in or concerning them*, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the parties to be charged therewith, or some other person thereunto by him lawfully authorized." He also contended that, even granting that the contract need not be in writing, the consideration consisted of an executed promise, and that therefore the contract could not stand, there being nothing to support it. The case principally relied on by the defendant was Mechelin v. Wallace (7 A. & E. 49), which was a case very closely resembling the case under consideration, except that the consideration there was an executed, and not an executory promise, and there it was held that the defendant's agreement to send in furniture was an inseparable part of a contract for an interest in land, and came under the provisions of section 4 of the statute of frauds. The plaintiff explained away the effect of that case by the fact that the contract there was based entirely on the agreement to let the house; but here the agreement was collateral to the agreement for a tenancy, which brought it within the authority of Morgan v. Griffith (L. R., 6 Ex. 70), in which case the respondent agreed to hire of the appellant grass land on the terms of a lease to be signed at some future time. The respondent, having entered on the land, found it overrun with rabbits, and on the lease being presented to him for execution, declined to execute it unless the appellant would promise to destroy the rabbits. The appellant declined to insert a clause in the lease to that effect, but agreed by parol that he would destroy the rabbits. The lease was then executed. Afterwards, the rabbits not having been destroyed by the appellant, the respondent sued him for damage done to the land demised. Evidence of the parol agreement was admitted by the judge, and the question was left to the jury as to whether the lease had been signed on the faith of it. Upon appeal, on the ground of misreception of evidence, it was held by the Court of Exchequer that the evidence was properly admitted, the parol agreement being collateral to the written lease. In deciding the present case (Angel v. Duke) the court acquiesced in the doctrine laid down in Morgan v. Griffith, Cockburn, C. J., holding that the present case could not be distinguished from Morgan v. Griffith, but that, independently of the authority of that case, the agreement upon which the action was brought was not within the section of the statute of frauds, and need not be in writing: "The first agreement, involving the plaintiff's becoming tenant of the premises, was antecedent to that upon which the breach is here averred. The agreement to repair and furnish, in consideration of the tenancy having been commenced, is posterior and collateral to that which, in order to have been sued upon, must have been in writing." In that view of the case entertained by the lord chief justice, the other members of the Court of Queen's Bench unanimously coincided; and Archibald, J., said that "the part of the contract, the breach of which is alleged, is severable from any contract to become a tenant. The defendant's agreement was conditional upon the tenancy, and became binding when he made his promise again in consideration of the accomplished fact. This was no agreement concerning land, and was collateral to that which could have been binding only if in writing." We think there can be little doubt that the decision in the case of Angel v. Duke is of a satisfactory nature; it is by no means desirable that those provisions in the statute, which are so expressly worded as to clearly manifest the intention of the legislature that they should only apply to land, should extend to matters savoring so little of reality as the subject of this contract.—[*The Irish Law Times.*

Correspondence.

NATURALIZATION OF ALIENS.

ABERDEEN, MISS., April 21, 1875.

EDITORS CENTRAL LAW JOURNAL:—I have read with some interest your views, and those of various correspondents, as to the action of Judge McKean in refusing naturalization to the Norwegian who "knew no constitutional law against polygamy."

Though I am inclined to think Justice McKean a hasty man, not always keeping his passions under the control of a cool judgment, yet I may be permitted to say I entirely agree with, and applaud his action, *in re* the "unlearned" Norwegian.

It must be borne in mind, that in the matter of naturalization there is no question of jeopardy of life or liberty, no question of guilt or innocence. Admitted or rejected, the applicant is still entitled to all the protection the law guarantees to the native citizen.

But the question is a higher one—a question of worth and qualification for the responsible position of citizen of the United States. In such case the courts are not only permitted, but are by law compelled to occupy a higher moral ground than when the life or liberty of the party are involved in the investigation.

By the act of Congress of April 14, 1802, before admitting any alien to the privilege of naturalization the court must be satisfied that the applicant has "behaved as a man of good, moral character, attached to the principles of the constitution of the United States, and well-disposed to the good order and happiness of the same."

Now the court can only ascertain this disposition of the applicant by questioning him and others as to the peculiar views he holds in relation to questions of order, morals and good govern-

ment. And I should emphatically say that where an applicant for citizenship has the impudence or ignorance to come into a court of the United States and coolly declare that he knows no *constitutional* law forbidding an offence which has been denounced as a deadly crime and sin, not only by the unanimous consent of the civilized world, but also by the express enactment of the Congress of the nation,—it were certainly well that the court should reject his application and bid him "tarry at Jericho till his beard be grown," and his *ignorance* corrected.

Nor can this be justly called a "religious test." A future applicant, carrying communism to extremes, may conscientiously believe that *theft* is no crime, and may "know no constitutional law against it:"—a community of Thugs may come from India, who may sincerely consider *murder* one of the fine arts, or a matter of religious duty, and appealing to our constitutional principles of toleration may "know no constitutional law against murder:"—or leaving extreme suppositions and coming to probability, aliens may come who have been educated to consider democracy a pernicious sham, and whose antipathy has been by no means softened by the occurrences of the past ten years;—others, too, who may, from their soul, believe the enfranchisement of the negroes of the south to be the filthiest outrage ever perpetrated on the fair name of freedom:—none of these may know or recognize any just or constitutional law opposed to their peculiar views. Yet I may ask,—if on their application for citizenship, these "peculiar views" should be elicited by the questioning of the court,—would not the court be bound, in consequence, to overrule their application, as persons *not* of good, moral character, or not "attached to the principles of our constitution and well-disposed to the good order and happiness of the same." And they would in vain plead "rights of conscience," "freedom of thought and speech," "religious scruples," etc. The court would inform them that the very sincerity and conscientiousness with which they held the doctrines alluded to, rendered them only the more ineligible to the privilege of citizenship.

Stout Oliver Cromwell in Ireland,—to the conquered people begging for liberty of conscience,—replied: "I meddle with no man's conscience, but if by 'liberty of conscience' ye mean freedom to hear mass, I will let you know *that* is a thing which can not be in these realms." So, by *our* laws, a man may believe what he chooses,—but should he, when applying to be admitted as a citizen, choose to declare his belief in any doctrine incompatible with the constitution, or the good order and happiness of the nation,—the court, by the law, is bound to exclude. The *law* may be harsh, but it is the law. But I do not consider it at all unreasonable.

Citizenship to the alien is not a right,—it is a privilege,—a not unreasonable condition precedent to which is that the applicant shall approve himself a man of good, moral character, attached to the principles of the constitution, and well-disposed to the good order and happiness of the nation. Can a man be said to be so "attached" and so "well-disposed," who coolly and insolently avows,—in the face of the unanimous detestation of the civilized world, and of the express and emphatic enactment of the national legislature,—that he "knows no constitutional law against polygamy."

Men may not be punished for sins of opinion or intention, unless expressed in an overt act,—but neither *per contra* shall men be *rewarded* for opinions, moral, political, religious, wholly incompatible with a sincere attachment to the principles of the constitution, or with any favorable disposition toward the good order and happiness of the nation,—to say nothing of the ordinary principles of virtue and morality.

This polygamy,—foul and hideous ulcer on the body politic, disgrace and reproach of our civilization,—has too long, under the influence of dilletante philanthropy, "*religious* liberty," etc., etc., etc., had *toleration;* shall this nation of christian people become its propagandists by rewarding its foreign proselytes with the freedom of the nation,—the crown of citizenship?

E. H. BRISTOW.

LANGDEAU V. HANES.

WASHINGTON, D. C., April 29, 1875.

EDITORS CENTRAL LAW JOURNAL:—In your issue of the 16th you have fallen into an error in speaking of the case of Langdeau v. Hanes. That case was *not* argued in the supreme court by Governor Hendricks. The case was submitted in that court on briefs filed on the part of the plaintiff, by John Hallum and W. B. Thompson, Esquires, and on the part of the defendant, by Hon. W. E. Niblack, of Indiana.

You say that the decision in Langdeau v. Hanes is understood to substantially overrule Gibson v. Chouteau. This is a mistake; the decision does not, in any respect, conflict with or qualify Gibson v. Chouteau. In that case it was held that the statute of limitations of the state of Missouri did not run in favor of an occupant of land so as to defeat the title conferred by the patent of the United States, subsequently issued upon a New Madrid certificate; in other words, that the statute did not begin to run against the title conferred by the patent, until the patent was issued, which would seem to be a self-evident proposition. In Langdeau v. Hanes there was a legislative confirmation of the claim of the heirs of Tongas, and it was held that such legislative confirmation operated as a grant or quit-claim of the government, perfecting the claimant's title; and the statute of Illinois only began to run against them *after* the title was thus perfected. There is no conceivable analogy between the two cases. Had there been a legislative confirmation of the claim under the New Madrid certificate, in Gibson v. Chouteau, there would have been no occasion for the patent of the United States to perfect the claimant's title. The statute of limitations would have commenced running, in that event, from the date of the confirmation. LEX.

Notes and Queries.

We ask the attention of our readers to the following query:

RAILROAD BONDS—PRIORITIES.

BOSTON, MASS., April 25, 1875.

EDITORS CENTRAL LAW JOURNAL:—A railroad company, say in Indiana, issues, say one million dollars of first mortgage bonds; it is then leased to another railroad company, which (in the lease) guarantees these bonds. Before a coupon becomes due, a difficulty arises, and payment of coupons refused; to settle this, all the bondholders, but one—holding say 10 bonds—agree to cancel three coupons from each bond, and to exchange their bonds for others of the same tenor and date, but bearing on each the direct endorsement of the guaranteeing road. Since this was done, the guaranteeing road has paid to the holder of these ten original bonds *all* the coupons which have matured, including, of course, is meant the three coupons corresponding to those cancelled by the rest. The question is, have these ten original bonds a *prior lien* upon the road to the $990,000 of substituting bonds? X.

Recent Reports.

Reports of Cases in Law and Equity, Argued and Determined in the Supreme Court of Georgia, at Atlanta. Parts of January and July Term, 1873. Vol. 49. By HENRY JACKSON, Reporter. Macon: J. W. Burke & Co. 1874.

The volume before us is one of very light weight, containing 750 pages, printed on light paper, with binding not of the best workmanship, and does not compare favorably with earlier volumes of Georgia Reports. By the code of Georgia, the decisions of the supreme court are required to be announced by the judges in a written synopsis of the points decided, and the synopses thus announced by the court are used as the head-notes of the cases, a most fortunate circumstance, since in the few cases where the reporter has supplied head-notes, their utter insufficiency to designate what is decided in the case, is very noticeable. The absence of side-heads and catchwords is a marked defect, and gives the entire volume an appearance of hasty and careless preparation.

Lateral Support—Municipal Corporation—Streets.—Mitchell v

Mayor, etc., p. 19. The owner of a building standing on the line of a lot in a city, can not acquire, by lapse of time, a prescriptive right to the lateral support of the adjacent soil of a public street, as against the municipal corporation.

Negligence—Damages—Comity of State Laws.—Selma, Rome and Dalton R. R. v. Lacey, p. 106. By Warner, Ch. J.—Where a widow sues, in Georgia, for damages for the killing of her husband in Alabama, by the negligence of a railroad company, operating its line in both states, the court will be governed by the laws of Georgia as to procedure, but as to the rights of the parties, by the laws of Alabama, where the act complained of was done. By McCay and Trippe, JJ.—Where, by the laws of Alabama, the personal representative of a party killed by the wrongful act or negligence of another, is entitled to an action for damages therefor, no other person than such legal representative can bring such action in Georgia, when the act complained of was done in Alabama. The widow can not maintain such action in her own name.

Street-Railway—Charter—Exclusive Privilege.—West End and Atlanta Street R. R. Co. v. Atlanta Street R. R. Co., p. 151. The act of incorporation of the defendant in error, provided "that said company shall have exclusive power and authority to survey, lay out, construct and equip, use and employ street railroads in the city of Atlanta, subject to the approval of the city council thereof for each route selected, first had and obtained, before the work thereon shall be commenced." *Held*, that no unconditional, exclusive power and authority to construct and use street-railroads in *all* the streets of the city was granted; but that the charter privilege applied only to such actual routes as might be selected by the company and approved by the council. A charter subsequently granted to the plaintiff in error, conferring "all the powers and privileges" of the defendant in error, was subject to the same restrictions, and where routes were selected under the latter charter, not identical with those previously selected under the former, there was held to be no infringement of the rights under the former charter.

Tax on Wholesale Dealers.—Bohler v. Schneider, p. 195. The act of legislature, imposing a special tax on wholesale dealers in malt liquors, is not in violation of the constitutional requirement, that "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed." It is a tax, not on the property, but on the business or occupation, or privilege. Citing Burch v. Mayor, etc., 42 Ga. 596. Nor is such tax void for uncertainty, because the law does not define what a wholesale dealer is. This can easily be determined, as any other fact, by evidence.

Criminal Law—Continuance—Defences—Newly-Discovered Evidence.—Malone v. The State, p. 210. Motion for continuance, on the ground that the defendant was too sick to engage in the trial, was supported by evidence of physicians, and the case passed. When called again at the same term, the motion was submitted without evidence, the counsel for defence stating that they had nothing further to allege in support of their motion. *Held* no error for the court below to overrule the motion.—"This court announces to the public, with all the emphasis its judgment can impart, that provocation by words, threats, menaces or contemptuous gestures will, in no case, be sufficient to free a person who kills another by shooting him, from the guilt and crime of murder."—Newly-discovered evidence, which is merely cumulative, is is no ground for a new trial.

Municipal Corporation—Liability for Damages Caused by Negligence of Contractors in Repairing Streets.—Mayor, etc., v. Waldner, p. 316. Suit was brought to recover damages for injury sustained by reason of an exposed and unprotected excavation in a city street, into which the plaintiff (below) fell, with the horse he was riding, at night. The opening was for a sewer, for the building of which the city authorities had contracted with Van Horn, who in turn had let out the contract to others. *Held*, that the duty of the city authorities to use precautionary measures to prevent accident and injury, while public works on the streets of a city are being prosecuted, renders the city liable for injuries sustained by reason of neglect to use such measures, not founded on the doctrine of *respondeat superior*, but on the general authority of the city government over its streets, and its police powers, to protect the public against obstructions and nuisances.

Jurisdiction—Removal of Causes to Federal Court.—Board of Commissioners of Floyd County v. Hurd, p. 462. Suit by Hurd, a citizen of Connecticut, against Floyd County, on bonds of said county. Petition of Hurd to remove cause to U. S. Circuit Court. *Held*, that Floyd county having been made by act of legislature a body corporate, with power to sue and be sued in any court of the state, the provision of the constitution of the U. S. that the citizens of each state shall be "entitled to all the privileges and immunities of citizens of the several states," applies to said county as a "citizen" (under the decisions of the U. S. Supreme Court, that a corporation is a citizen, for the purpose of giving jurisdiction to the federal courts), and the county was therefore subject to sue and be sued in the federal court: Citing Railway Co. v. Whitton, 13 Wall. 290; City of Lexington v. Butler, 14 *Ibid.* 293.

Will—Construction of Legacies.—Tennille v. Phelps, p. 532. A testatrix, in her will, directed that her executors should keep up her plantation and work the slaves thereon, "for the purposes herein after mentioned." In the same clause she directed that if the plantation should prove unprofitable, or there should be danger of a depreciation of property, the executors should sell the same, and reinvest the proceeds. Another clause gave certain money legacies to nephews and nieces, "to be paid out of the plantation without interest, after paying all expenses arising from its prudent management." Another clause gave the use of her estate to her son, with appointment of her husband as trustee and guardian. The slaves were emancipated shortly after the death of testatrix, in 1864. *Held*, that the intention was that the legacies to nephews and nieces were only to be paid out of the profits of the plantation, and as this became impossible by the emancipation of the slaves, the legacies failed, and the *corpus* of the estate went to the son, free from any charge to pay said legacies. Citing 1 Atkins, 508; 1 P. W 540; Pulsford v. Hunter, 3 Brown's ch. ca. 416; Page v. Leapring, 18 Vesey, 463.

Insurance—Principal and Agent.—Underwriter's Agency v. Seabrook, p. 563. Bill to enforce liability against insurance company for loss of cotton caused by sinking of a steamboat, on the ground that the agent of the company had fraudulently misled the owners to induce them to believe the cotton was insured by the said company. Evidence that the agent was also agent of several other companies, and nothing in the proof to show which of them the agent was acting for at the time he did the acts from which the fraud was sought to be inferred—verdict against the company set aside, and a new trial ordered.

C. A. C.

Book Notices.

LAW OF PRIVATE CORPORATIONS. By JOSEPH K. ANGELL and SAMUEL AMES. Tenth Edition. Edited by JOHN LATHROP of the Boston Bar. Boston: Little, Brown & Co. 1875.

On the general subject of the Law of Private Corporations, the work of Angell & Ames is practically the only one we have. It was originally published in 1831. Since then, Chief Justice Ames, of Rhode Island, one of the authors, and Mr. Angell, the other, have died,—the former, after supervising the preparation of the seventh edition, in 1866. The subsequent editions, including the present, have been edited by Mr. Lathrop. To this edition 226 cases have been added, and the citation of cases is brought down to the present time.

The work itself needs no praise from us. It has occupied the field for more than the third of a century without a rival, and in the American Law of Private Corporations it is to-day without a competitor. While conceding this, we feel constrained to add that the development of corporation law in England and in this country, within the last 25 years, has been so rapid that it has, in many of its most important branches, outgrown the work which treats of it, notwithstanding the labors of the authors and editors. The latter has been hampered by the desire to preserve the frame of the original treatise, and the changes in the law and the additions to the law which have been made, have been incorporated into the work as best they might, sometimes by a sentence in the text, but generally by the way of notes. Topics, which have become vastly important since the death of Mr. Angell, and ever since that of Judge Ames, are not presented with that fullness which they deserve, and can not be while the editor considers himself bound to leave the original structure intact. During the last ten years, for example, the law on the subject of the liability of shareholders has been much modified, indeed, almost created by the adjudications in Great Britian, which greatly out-number those in this country; and whoever wishes to do that subject justice, must build anew, using freely all the material at his hand for the purpose. If the reader will compare what is presented in this work upon *ultra vires*, with the late English work of Mr. Brice, he will see how far short the former falls of giving a complete view of the law on this subject. We could instance other illustrations of a similar character. This is not the fault of the editor; for Mr. Lathrop has done his work carefully and well. We make these observations in the hope that in the next edition the function of the editor may be enlarged into that of author, and that the whole work may be *thoroughly revised*, and all useless material thrown out and all that is useful skilfully incorporated into a symmetrical treatise, which shall be as relatively perfect now as Angell & Ames' work was when originally produced.

J. F. D.

THE HISTORY OF LAWYERS, ANCIENT AND MODERN. By WILLIAM FORSYTH, author of "History of Trial by Jury," etc. New York: James Cockcroft & Co. 1875.

This handsome volume, bound in cloth, and uniform with the late editions

of Campbell's Lives of the Chief Justices, from the same publishers, will doubtless be heartily welcomed and largely read by the profession in this country. The reputation of the author is already well established by his other works, and the charming style and interesting matter of the present work will commend it to all readers, lay and professional, into whose hands it may fall. The author extends his researches far back into the time of the Roman Republic, and the "palmy days of Greece," for bits of history and biography relating to the ancient and honorable profession, and traces its growth down through all the ages that have gone, to the present time. The ancient forms and practice in the conduct of trials; the rules of etiquette and evidence which obtained; the styles of forensic eloquence which were adopted; the officers and appendages of the courts of justice; and the modes of procedure which existed in the olden time, are all pleasantly and gracefully portrayed. Not the least interesting passages in the book are the biographical sketches of many of the noted advocates of Greece and Rome; their manner, their acquirements and their successes. Accounts of celebrated trials are frequent and well-written. For "summer reading," during the "long vacation," no more entertaining book could have been presented to the profession; while to the student at law, the information contained in its pages will be found invaluable.

Our readers must not, however, suppose that the book is a new one by any means. It was first published in London, by Murray, in 1849, under the title of "Hortensius; Duty and Office of an Advocate."

The publishers have apparently assumed to improve upon the author, and have taken the liberty of reprinting his book under a new name. Of course this can work no injury to the intrinsic value of the book, but it certainly does the publishers no credit, but rather the reverse; for it has the appearance of an effort to palm off the book upon the public as a *new work, prepared expressly for them* by the distinguished author. The bungling manner with which the thing is done, is almost as bad as the act itself; for on page 130, of this edition, the author says: "Of the more immediate contemporaries of Cicero, no advocate approached him in reputation so nearly as Hortensius; *and as his name has been chosen to give the title to the present work*, we may indulge in some detail of his biography."

Thus it appears that this attempt to palm off an old book as a new one does not even possess the respectability of a skillful forgery; for the text of the book itself is inadvertently left unaltered to accuse the trickery which could attempt such a fraud upon an enlightened and honorable profession.

Messrs. Cockcroft & Co., have, in this instance, however, been kind enough to allow the name of the learned author of Hortensius, Mr. Forsyth, to stand on the title page of his book, and have correctly reproduced his preface, discreetly omitting, however, the *date*. They were not so kind to Sir G. Stephen, when they recently reprinted his most excellent and readable little book, "Adventures of an Attorney in Search of Practice," accrediting it to Samuel Warren, an author much more widely known in this country. We have long entertained the candid and conscientious conviction that those American publishers (we do not now refer to the publishers of the volume before us) who are in the habit of reprinting the works of English authors without paying them an adequate copyright, because the state of the law permits them to do so, are, in the eye of justice and sound morals, no better than horsethieves, and as little deserving of recognition among gentlemen. Practices like the present, while perhaps not equally injurious to individuals, are equally calculated to bring us into disrepute among honest foreigners, and to make American gentlemen ashamed to look in the face their cousins on the other side of the Atlantic.

What we feel obliged to say in this instance is said more in sorrow than in anger, and with the sincere desire of doing the enterprising publishers of the book before us a service. We venture to suggest to them that no well-read person can long be deceived by such practices, and that they grossly misinterpret the sentiments of the profession to which they chiefly look for patronage, if they suppose that such devices can be practiced upon them without condemnation.

VICK'S FLORAL GUIDE. No. 3, for 1875. JAMES VICK, Rochester, N. Y.

We are much obliged to Mr. Vick for this. Next to the study of Fearne on Remainders, nothing is so calculated to delight the mind as the culture of flowers; and Mr. Vick tells us all about this—and where we can get the seeds. We are curious to know where this was printed. It is the best specimen of printing we have ever seen.

Summary of Our Legal Exchanges.

Estoppel against Retiring Partner who Permits Continued Use of his Name.—Speer v. Bishop *et al.* [24 Ohio St. 598.] 1. A co-partnership, consisting of a father and son, carried on business under the firm name of H. S. & Co. H. S., the father, who was a man of means, and gave, the firm its credit, sold his interest in the firm to his partner and another son, who, by agreement with the father, continued the business as theretofore in the firm name of H. S. & Co. In an action by a creditor who had trusted the new firm on the faith that the father was a member: *Held*, That the father, by allowing his name to be so used, held himself out as a member of the new firm, and was thereby estopped from denying the fact, although publication had been made of the dissolution of the old, and the formation of the new firm, of which the creditor had, in fact, no notice. 2. An objection on the ground of variance between the proof and the pleading, should be taken on the trial. Where this has not been done, it is too late, on error to make the objection.

Interpretation—Corporation—"Person."—The State v. Cincinnati Fertilizer Company. [24 Ohio St. 611.] A corporation is not a "person" within the meaning of the act of April 15, 1857, to prevent nuisances, and therefore not liable as such to be indicted and punished for violation of the provisions of said act.

Parol Proof to Show that Absolute Deed was made on a Trust.—Mathews v. Leaman. [24 Ohio St. 615.] In this state, notwithstanding the statute of frauds, it is competent to establish, by parol evidence, that a deed of conveyance, absolute in form, was executed upon the consideration that the property conveyed was to be held in trust for the grantor, and reconveyed on demand.

LEGAL GAZETTE (PHILA., KING & BAIRD) FOR APRIL 9.

National Banks—Special Deposits.—Wiley v. First National Bank of Brattleboro, Supreme Court of Vermont, Feburary Term, 1875, opinion by Wheeler, J. [7 Leg. Gaz. 116]. The taking of special deposits to keep, merely for the accommodation of the depositor, is not within the authorized business of national banks, and their cashiers have no power to bind them to any liability on any express contract accompanying, or any implied contract arising out of such taking.

The editor of the Legal Gazette comments on this important decision as follows: "This involves the same point with regard to national banks as was decided in the case of our own state banks in Lloyd v. The West Branch Bank, 3 Harris, p. 172, viz.: that the act of the cashier in receiving such deposits not being authorized or ratified by the stock-holders, nor within the general usage, custom, or practice of the bank, must be shown to be within the legally authorized course of business of the institution, in order to render it liable for their safety.

"The general question of the responsibility of national banks for the loss of special deposits, has been before both our own supreme court and the United States Circuit Court for this district. See Scott & Bro. v. The National Bank of Chester Valley, 28 P. F. S. 471; Scull v. Kensington National Bank, tried before Justice Williams, at *nisi prius*, March 17th, 1873, together with the opinion of the court in banc on a rule for a new trial; and White v. Commonwealth National Bank, tried before Cadwalader, J., in the United States Circuit Court, 4 Brewster, 234. In all these cases, however, the cashier or other officer receiving the special deposits, in so doing was acting directly within the scope of his authorized employment by the bank, and in pursuance of its known practice, and hence the question discussed in the Vermont case was not raised."

Constitutional Law—Power of the Legislature to Impose on the Courts Extra-Judicial Duties.— In the matter of the application to appoint a board of assessors for the city of Pittsburg. Court of Common Pleas, No. 2, of Allegheny County, Pennsylvania, opinion by White J. [7 Leg. Gaz. 117.] 1. The Legislature has no power to impose upon the judges of the court duties which are in their nature extra-judicial. 2. The objection to the conferring or exercising of such powers does not rest on a constitutional prohibition, but is based on the fundamental structure of the government, by which such powers and duties belong to the other departments, and not to the judiciary. 3. Where the constitution has provided that the jurisdiction and powers now vested in the district courts and courts of common pleas, shall be in Allegheny vested in the two distinct and separate courts of equal and co-ordinate jurisdiction: *Quære*, can jurisdiction be subsequently given by the legislature of certain proceedings to one court only? 4. A law making a special provision for cities of the second class, is local and special legislation within the constitutional prohibition, it being notorious that the city of Pittsburg is the only city of the second-class in the state. 5. The act of the assembly passed March 18th, 1875, requiring the judges of Common Pleas, No. 2, of Alleghany county, to appoint a board of assessors, held unconstitutional.

Legal News and Notes.

—ANOTHER federal judge, Mr. District Judge Dick, of North Carolina, has, in his charge to a grand jury, declared the civil rights law unconstitutional.

—IN the great six million suit brought against Tweed, the ex-boss wants a bill of particulars. The Herald suggests that the attorney-general should send him the minutes of the board of supervisors.

—THE house of representatives of the Massachusetts legislature has passed a bill depriving all municipalities in that state of the power to subscribe stock to railroad corporations.

—WE regret to learn that Mr. District Judge Erskine of the Federal Court, for Georgia has had an attack of erysipelas; and for some days his face was, like Mr. Beecher's explanation of the ragged-edge letter, unintelligible.

—THERE are some Englishmen who can not take a joke without a surgical operation. The London Daily Telegraph thus seriously comments on the police reports of the Detroit Free Press: "We may not approve of jocularity in a magisterial court, but, on the whole, it may be questioned whether the mirthful readiness of the American judge may not be preferable to the solemn injustice which local courts in England so frequently witness."

—THE defence in the Tilton-Beecher case closed without any attempt to call Mrs. Tilton as a witness. Thereupon Mr. Beach, of counsel for Mr. Tilton, announced that no objection would be made to her testifying. Meantime Mrs. Tilton has addressed a letter to Judge Neilson, demanding the privilege of being heard. We shouldn't be surprised if she made another confession before the trial is over.

—THE Philadelphia Legal Gazette, which, during the first six years of its existence has been under the editorial management of John a Campbell, Esq., has changed editors, Mr. Campbell retiring on account of the demands of his practice, and George P. Rich, Esq., succeeding him. Mr. Rich has taken hold with energy and good judgment. We notice an increase of editorial matter, and a reaching-out for the freshest and most important decisions. He has our best wishes for his success.

—IT seems that Brigham Young has not paid all the "alimony and sustenance" awarded by Chief Justice McKean in favor of his "wife," Ann Eliza, and that he is in default as to a monthly allowance of alimony, the same being the moderate sum of $500, much more, no doubt than Ann Eliza got while she cohabited with Brigham during the honey-moon. Accordingly he has been again summoned before the court, this time before Chief Justice Lowe, the successor of Judge McKean, to show cause why he should not be committed for contempt. The learned judge took the papers.

—LADY LAWYERS.—A correspondent of an English journal says: Some time ago, four ladies who passed the London University examination for women, entered themselves in the chambers of well-known barristers for the purpose of studying law. It was said at the time that their labor would be fruitless. It seems, however, that the ladies are likely, as the result of their studies, to obtain profitable employment. One of them, whose term of study is closed, has been engaged by a firm of solicitors as a "consulting counsel," and is at once to receive a salary larger than the income enjoyed by scores of barristers who have been in practice for years.

—THE Albany Law Journal, referring to the question of limiting the power of judges to commit for contempt of court, says: In France, by article 222 of the code penal, words tending to impeach the honor or integrity of magistrates are punishable by imprisonment for not less than one month nor more than two years. If the words are uttered in court, the punishment is imprisonment for a period of from two to five years. The Italian code contains similar provisions, and most of the other penal codes of Europe follow in the same line. The Prussian code is said to contain provisions specially directed against newspapers. By the Indian penal code, section 228, whoever intentionally offers insult or causes interruption to a judge sitting in a cause, is punishable by imprisonment not less than six months or by fine not exceeding 1,000 rupees, or by both fine and imprisonment. In England the railway commissioners and county court judges are only allowed to punish summarily, contempts committed in the face of the court.

—MISS CARRIE S. BURNHAM, of Philadelphia, in December last, applied for admission to the bar of the Pennsylvania courts, but the board of legal examiners declined to examine her on the ground that there was no precedent in that state for the admission of a woman to practice at the bar. Miss Burnham then petitioned the court of common pleas for an order requiring the board of examiners to show cause why they should not examine her as other students of law are examined. The petition alleged that the action of the board prevented her from earning a livelihood in her chosen profession, and that in this way she was denied one of the most vital privileges belonging to a citizen of the United States; and that she was prevented from "enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing her own happiness," which, in the new constitution of Pennsylvania, are declared "inherent and inalienable rights." The petition was denied. Miss Burnham has also brought a suit against the board of examiners for $200,000 damages.—[*Albany Law Journal*

—THE Dana *habeas corpus* case has been decided in favor of the prisoner, by Judge Blatchford, sitting in the federal circuit court at New York. Mr. Dana, editor of the New York Sun, a paper which has been very severe in its attacks upon office-holders in Washington, was subpœnaed to appear as a witness in one of the courts of the District of Columbia, in a case of which he protested he knew nothing. Mr. Dana suspected that it was a trick to draw him within the jurisdiction of the criminal court of that district, in order that he might be prosecuted for libel. He therefore refused to attend, was arrested on attachment, and sued out a writ of *habeas corpus* before Judge Blatchford, by whom he has been discharged.

—JOHNSTON V. THE "ATHENÆUM."—In connection with the recent action for libel at the instance of Messrs. Johnston, Edinburgh, against the Athenæum, we are informed, on the most trustworthy authority, that the following system was practiced by the jury in fixing the amount of damages to be awarded. The jury, it may be remembered, were not unanimous, there being one gentleman who from the first declined to acquiesce in a finding giving any except nominal damages; but by the other eleven it was agreed that each should, without consulting his neighbor, write down what he considered a fair award; that these separate sums should be added up, and that the sum total should then be divided by 11, the product of this division to be taken as the damages to be assessed. In accordance with this arrangement, the following sums were jotted down by the eleven jurymen, and given as their decisions, viz: £2,000, £3,000, ½d., £50, £1,500, £3,000, £500, £1,000, £500, £2,000, £500—total, £14,050. This sum, after being divided, gave £1,277 as the damages to be awarded, but in order to make the figures the more presentable the jury agreed to strike off £2, there being thus produced the £1,275 damages announced in court.—[*Scotsman*.

LEGAL ADVERTISING.—The Crawford Mirror, published in Cuba City, Missouri, is ably discussing the question of "legal advertising," with the party organ of that city. The law of Missouri fixes the rate of legal notices at $1 per square first insertion, and 50 cents for each additional insertion. The Mirror, with a circulation more than double that of the party organ, charges legal rates, but uses nonpariel type, which gives an average of 110 to 120 words to the square. The Express, of the same place, uses brevier, two sizes larger, giving an average of about sixty words to the square. A notice of 280 words is so strung out in the Express, that the cost is $12.50, which, in the style and type used by the Mirror, would cost $5.00. The Mirror has verified its statement, although none questioned it, and yet the authorities pay no heed to the matter, and as the Mirror well says, "this trick of the trade is resorted to for the simple purpose of compelling all parties and classes who are so unfortunate as to become litigants, to contribute to the support of a 'party organ,' which otherwise has not merit to attract a dozen readers." What is true of these Cuba City journals, applies with equal force almost everywhere, and the amount of money thus squandered on party organs doubtless foots up millions of dollars each year.—[*American Journalist*.

—THE following is a copy of the decree of Chief Justice McKean of Utah, committing Brigham Young for contempt for refusing to obey his decree awarding alimony and sustenance to Ann Aliza, the nineteenth wife of the prophet. We think the part we have italicised might have been rejected as surplusage. Judges are appointed simply to administer the law, and not to impress "great facts" upon the minds of the people:

"Territory of Utah, Third District Court. Ann Eliza Young, by her next friend, v. Brigham Young. This court having, on the 25th day of February last, made an order in this cause, ordering and adjudging that the defendant herein should pay alimony and sustenance, the former within 20 and the latter within 10 days thereafter, and the defendant having disobeyed the said order in this, that he has refused to pay the sustenance therein ordered to be paid, and the defendant having been brought before the court by warrant of attachment and ordered to show cause, and having, in writing and by counsel, shown such cause as he and they have chosen to present to the court; and the court holding and adjudging that the execution of the said order of the 25th day of February last can be stayed only by the order of this or some other court of competent jurisdiction: It is, therefore, because of the facts and premises, ordered and adjudged that the defendant is guilty of disobedience to the process of the court, and is therein guilty of contempt of court. *And since this court has not one rule of action where conspicuous, and another where obscure persons are concerned; and since it is a fundamental principle of the Republic, that all men are equal before the law; and since this court desires to impress this great fact, this great law, upon the minds of all*

the people of this territory; now, therefore, because of the said contempt of court, it is further ordered and adjudged, that the said Brigham Young do pay a fine of twenty-five dollars, and that he be imprisoned for the term of one day. Done in open court, this 11th day of March, 1875.

JAS. B. MCKEAN,

Chief Justice, etc, and Judge of the third district court."

Immediately after the reading of this order in open court, Brigham Young paid the fine, and $3,000 sustenance, and was then imprisoned for one day.

—IT is perhaps worthy of passing mention that a series of new civil suits have been commenced, against William M. Tweed, the "statesman," who languishes in durance vile on Blackwell's Island, to recover the money stolen by him when in office, from the city of New York. It will be remembered that the previous suits, prosecuted with such vigor by Mr. O'Conor, Mr. Tilden and Mr. Peckham, miscarried in the Court of Appeals—not on the merits—but on a legal technicality, that court holding that the title was not in the state, and that the suits were hence improperly brought. This difficulty has now been remedied by an act of the legislature, and the lean dogs of the law will again be let loose after the plethoric convict, and Mr. David Dudley Field, his principal counsel, will have an opportunity of displaying his great talents more sig..ally (though not in as worthy a cause) as he could by promoting the reform and codification of international law. It is anticipated that the New York Court of Appeals may decide favorably upon the case before it, invovling the legality of the cumulative sentences under which the great ex-boss is suffering imprisonment. Should this be the case, he will be released from imprisonment on Blackwell's Island, only to be conveyed to the county jail as a fraudulent debtor. It will be remembered that when the storm began to gather upon him, he conveyed most of his ill-gotten property to various persons, most of it to his son, Richard M. Tweed, "in consideration of love and affection and the thirteenth part of one dollar." This property has been attached, and those fraudulent conveyances will be uprooted wherever it may be done. To facilitate these operations, a pardon has been granted to James H. Ingersoll, the great chair-maker of the Ring, on condition of telling what he knows about the internal operations of that celebrated body, and it is thought that he knows nearly as much about it as the boss himself. "Now, by Saint Paul, the work goes bravely on!" So think Mr. O'Conor and Mr. Peckham; and in the meantime, Tweed no doubt employs his leisure by rubbing himself against the bars of his cell, to ease his cutaneous irritation, while he reflects, alas, too late, upon the old adage, "the way of the transgressor is hard."

—"G W. S.," the London correspondent of the New York Tribune, says: "The hero of the hour is Mr. Sergeant Ballantine. His successful—for it is practically successful—defence of the Guikwar of Baroda has more than restored whatever prestige he may have lost from his connection with the losing side in the Tichborne cause. In India he is looked upon by the natives as a man who has overthrown the English government in a conflict where the whole power of the government was brought to bear against a native prince. In England it is of course only his professional renown which is enhanced, but the circumstances are so peculiar that they will be long remembered. He went to India at a moment's notice, tempted by a fee which, large as it is, would scarcely have been large enough to secure his services five years ago. He was to have $50,000 for a journey of three months. It was said at the time that an effort was first made to retain Mr. Hawkins. That eminent barrister declined, because no fee could compensate him for the loss of practice which would follow so long an absence. Sergeant Ballantine is reported to have lost a portion of his from the mere length of time during which he was occupied in the Tichborne business. English habits are peculiar. When attorneys and clients find they can not get the man they prefer in a particular cause, they must necessarily go to some one else. The mischief is they are likely to keep to the second man, and the first gradually drops out of the custom which has so long been his. This ought to have been true, it would seem, in Mr. Hawkins' case as well as in Mr. Ballantine's. I suppose Mr. Hawkins' wonderful success brought back his old clients. Be that as it may, there is no doubt that his great rival has regained all his old fame, and more than all. The leading journal of England paid him the extraordinary compliment of saying that the result of the trial would probably have been different but for his cross-examination of Col. Phayre—the whole of which it reprinted. The American public has been taking a good deal of interest lately in the art of cross-examination. You would, perhaps, find Mr. Sergeant Ballantine's performance not less masterly than those of Mr. Evarts and Mr. Fullerton. I have read my share of all three, and I am not clear which ought to be called the most subtle, the most persuasive, or the most deadly."

INJUNCTION AGAINST STRIKERS.—A novel application in the injunction line was made recently, before Judge Barrett in the supreme court chambers in New York City. Augustus M. Mueller, a tailor, at No. 42 East Fourteenth street, recently discharged twenty-three tailors in his employ, on account of their refusal to continue working without increased pay. The men thus discharged, as Mr. Mueller alleges in his affidavit, have ever since been in the habit of collecting in groups about his place and preventing others who are willing to work, from taking their places. He has submitted to these annoyances for about two weeks, and now invokes the law to put a stop to it. Through his counsel, Mr. W. H. Field, application was made for an injunction to restrain the striking tailors from interfering with his employment of other workmen, and from interfering with such workmen after they are employed. It is charged in the complaint that the men discharged by him have conspired together and threatened to continue their interference until they are re-employed at the wages they demand, or his business broken up. He claims that this interference has already damaged his business to the amount of $5,000, and hence the application for an injunction. Ex-Judge Dittenhoeffer opposed the application in a very elaborate and forcible argument. He insisted that if the parties complained of had done any wrong, they were responsible in an action at law; that conspiracy is a crime, and a court of equity can not issue an injunction to prevent the commission of a criminal offence; that there is no precedent for such action; that laborers have rights as well as capitalists; that they have a right to combine or peaceably to assemble, with the view of assisting or protecting their rights; that if in doing so they commit a breach of the peace, they are amenable to the laws of the state; that an injunction is the strong arm of equity, which ought never to be extended unless in cases of great injury, when courts of law can not afford an adequate remedy in damages; that, at the most, the conduct complained of is a mere trespass, and that a court of equity can not interfere unless actual damage to property is shown. At the conclusion of the argument, Judge Barrett stated that the application struck him as a very novel one, and that it was, in fact, what Judge Dittenhoeffer stated in his argument, an application to put down a strike by an injunction, which he doubted his power to do. He said that he would, however, examine the papers which were at once passed up to him.—[*New York Herald.*

—HOMESTEADS IN MINNESOTA.—The Supreme Court of Minnesota has lately rendered an interesting decision, ruling a number of points arising under the homestead law of that state, in the case of Barton and Wife v. Drake, opinion by Young, J. The syllabus is as as follows:

1. The first section of the act, entitled "Homestead Exemption," (Gen. Stats. Chap. 68, Re-enacting Laws, 1858, Chap. 35), which provides for a homestead limited in area, but not in value, is constitutional. Cogel v. Mickson, 11 Minn. 475, followed.—2. The second section of the same act, which provides that a mortgage or other alienation of a homestead by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, is in itself constitutional, and is embraced within the subject expressed in the title of the act.—3. The act of March 10, 1860, (Laws 1860, Chap. 95, Gen. Stats. p. 499), authorizing the owner of a homestead to sell the same, or remove therefrom, does not repeal the second section of laws 1858, Chap. 25, (Re-enacted in Gen. Stat. Chap 68, Sec. 2.).—4. When the owner of a tract or lot, within the statutory limit of a homestead, actually occupies the same as his sole place of residence, such lot or tract becomes his homestead without further selection.—5. A conveyance of his homestead by a married man, without his wife's signature to the same is void. A contract to convey his homestead, made by the husband alone, without his wife's signature, does not bind the land, and cannot be specifically enforced; since a judgment for the specific performance of such a contract, rendered in an action against the husband alone, can have no greater effect than the deed of the husband alone. Such conveyance, contract, or judgment, is not rendered valid by the circumstance, that the premises therein described, subsequently lose their character of of homestead.—6. B., a married man owning and occupying a homestead of 45½ acres, contracted to convey the same to D., with 19 lots comprising about 5 acres, adjacent thereto, his wife not signing the contract. D. brought suit and recovered judgment for specific performance against B. alone, no claim being made by him that the 45½ acres were a homestead. The judgment provided that unless B. should, within 30 days after service of such judgment upon him, have ready for delivery the deed therein directed to be executed by him, he should be deemed to be in default, and that upon such default the judgment should become a lien upon the land. B. and wife having brought this action in the same court to set aside the judgment, and the lien thereof, so far as it related to the 45½ acres: *Held*, that the judgment was a final judgment; that although no copy of the judgment had been served on B., the existence of the judgment, which was regular and valued on its face, and whose invalidity could only be shown by extrinsic evidence of the occupancy of the 45½ acres, as a homestead at the time the contract was made, creates a cloud upon B.'s title, to remove which this action would lie; and that any equites D. might have against B., growing out of the setting aside of the judgment as to the 45½ acres, would be more properly adjudicated in the suit of D. against B. than in this action.